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MĀLIK'S CONCEPT OF ᶜAMAL IN THE LIGHT OF MĀLIKĪ LEGAL THEORY

VOLUME ONE

A DISSERTATION SUBMITTED TO
THE FACULTY OF THE DIVISION OF THE HUMANITIES
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BY
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PREFACE

Background to the Study

I began study related to the topic of this dissertation during my second year of graduate school when I started reading in ash-Shāfiᶜī's "Kitāb Ikhtilāf Mālik wa 'sh-Shāfiᶜī"[1] and Mālik's Muwaṭṭa'[2] under the supervision of Dr. Fazlur Rahman. I wrote research papers solely on the basis of what I found in these works without reference to commentaries on them or to works on Islamic legal theory. In my third year, however, I undertook a detailed study of Islamic legal theory. It appeared to me as a result that

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[1]Muḥammad ibn 'Idrīs ASH-SHĀFIᶜĪ, "Kitāb Ikhtilāf Mālik wa 'sh-Shāfiᶜī," in Kitāb al-'Umm by Muḥammad ibn 'Idrīs ash-Shāfiᶜī, ed. Muḥammad Zuhrī an-Najjār, 8 vols. (Cairo: Maktabat al-Kulliyāt al-'Azharīyah, 1381/1961), 7:191-269.

Ash-Shāfiᶜī (150-204/767-820) is the founder of the Shāfiᶜī school of Islamic law, one of the four main sunnī [orthodox] schools of law. He studied under Mālik in his early years and followed the Mālikī school of law. Later he came to Baghdād, where he came to know well Muḥammad ibn al-Ḥasan ash-Shaibānī (132-189/749-805), the chief proponent in his generation of the Ḥanafī school of law. Thereafter, Ash-Shāfiᶜī founded his own distinctive school. See Fuat Sezgin, Geschichte des arabischen Schrifttums, vol. 1: Qur'ānwissenschaften, Ḥadīt, Geschichte, Fiqh, Dogmatik, Mystik bis ca. 430 H; vol. 2: Poesie; vol. 3: Medizin, Pharmakologie, Zoologie, Tierheilkunde; vol. 4: Alchimie, Chemie, Botanik, Landwirtschaft; vol. 5: Mathematik; 5 vols. (Leiden: E. J. Brill, 1967), 1:484-485.

[2]Mālik ibn 'Anas, Al-Muwaṭṭa', ed. Muḥammad Fu'ād ᶜAbd-al-Bāqī (Cairo: Dār 'Iḥyā' at-Turāth al-ᶜArabī, n.d.).

For Mālik's biographical data, see below, pp. 39-95.

many of the conclusions I had drawn on the basis of analyzing the legal texts of ash-Shāfi^{c}ī and Mālik without sufficient background in legal theory had been erroneous and superficial interpretations of the data in those works.

I developed the desire to analyze the legal opinions of the early fuqahā' [Islamic jurists] in the light of the respective legal theories of their schools. I began preparation to that end by working with Dr. Fazlur Rahman in Ibn Rushd's Bidāyat al-Mujtahid,[1] because it was especially well-suited for that purpose. In this work, Ibn Rushd--himself an experienced faqīh [Islamic jurist] and qāḍī [judge]--analyzes the fundamental points of difference in

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[1]Muḥammad ibn 'Aḥmad IBN RUSHD [al-Ḥafīd], Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid (Egypt: Dār al-Kutub al-^{c}Arabīyah al-Kubrā, n.d.).

Ibn Rushd [al-Ḥafīd] (520-595/1126-1198)--known in Latin as Averroës--was one of the greatest scholars and thinkers of Muslim Andalusia. Although generally known for his Aristotelian philosophical works, Ibn Rushd was well-learned in medicine and other biological and physical sciences. He was a prolific writer and is reported to have written over fifty works.

Ibn Rushd came from a prominent Cordovan family of fuqahā'. His grandfather, Ibn Rushd [al-Jadd] (450-520/1058-1126) is to this day one of the most highly regarded Mālikī legal theorists. Ibn Rushd [al-Ḥafīd] shared in this family tradition of legal knowledge also. He was well-learned in the law and legal theory of the Mālikī, Ḥanafī, and Shāfi^{c}ī schools. Like his grandfather and father before him, Ibn Rushd [al-Ḥafīd] was a qāḍī [judge], first in Seville then later in Cordova. Like his grandfather, he became the qāḍī al-jamā^{c}ah [chief judge] of Cordova.

Ibn Rushd was especially interested in the reasons for the differences of opinion among the fuqahā'. He wrote at least two works on this topic: At-Taḥṣīl, which apparently has been lost, and Bidāyat al-Mujtahid.

See Khair-ad-Dīn az-Ziriklī, Al-'A^{c}lām: Qāmūs Tarājim li-'Ashhar ar-Rijāl wa 'n-Nisā' min al-^{c}Arab wa 'l-Musta^{c}ri-

legal questions between the major fuqahā' of the early period in terms of the legal theory of their respective schools.

Ibn Rushd's analysis of these different legal opinions indicated to me that there were patterns that recurred consistently and predictably in the differing conclusions of each of the major fuqahā' whose opinions he treated. Hence, it appeared to me that there was a real connection between the legal reasoning of the early fuqahā' and the legal theory of their schools, even though in some cases that legal theory had not been written down until generations after the death of the early fuqahā'. Legal opinions of Mālik and 'Abū Ḥanīfah,[1] for example, which had appeared to me to be poorly reasoned or arbitrary before I had studied Islamic legal theory, appeared in the light of Ibn Rushd's theoretical analysis to be consistent in terms of Mālikī and Ḥanafī legal theory. In Bidāyat al-Mujtahid, I found the first cogent legal explanations of what Mālik, as a

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bīn wa 'l-Mustashriqīn, 13 vols. (Beirut: n.p., 1389/1969), 6:212-213; ᶜUmar Riḍā Kaḥḥālah, Muᶜjam al-Mu'allifīn: Tarājim Muṣannifī 'l-Kutub al-ᶜArabīyah, 15 vols. (Damascus: Maṭbaᶜat at-Taraqqī, 1378/1959), 8:228.

[1] 'ABŪ ḤANĪFAH an-Nuᶜmān ibn Thābit (ca. 80-150/ca. 699-767) is the central figure of the Kūfan or Ḥanafī school of law, which is named after him. He was of Persian background and studied under several Successors [tābiᶜīn] in Kūfah and, possibly, under some of the Companions [ṣaḥābah] of the Prophet. He studied under ash-Shaᶜbī (d. 104/722) and ᶜAṭā' ibn 'Abī Rabāḥ (d. 114/732). His primary teacher, however, was Ḥammād ibn 'Abī Sulaimān (d. 120/737), who had an immense influence upon him. See Sezgin, 1:409-410.

faqīh, might have conceived ᶜamal [the established legal practice] to be and how he had applied it. It was on the basis of my studying Bidāyat al-Mujtahid that I decided to write my dissertation on Mālik's conception of ᶜamal.

I felt that Ibn Rushd's analysis of ᶜamal merited further treatment and closer examination in the Mālikī source works themselves and in the works of other Mālikī legal theorists. First of all, the question of what ᶜamal was conceived to be and how it was used is of fundamental importance to the history of the formative period of Islamic law and legal theory. Furthermore, it has considerable bearing on historical questions pertaining to the origin and transmission of ḥadīth [reports of sayings, deeds, and tacit approvals of the Prophet]. Finally, I felt such a study would provide greater knowledge of and insight into the Mālikī school of law, which--although one of the largest and historically most significant sunnī schools of law--has not received much attention among modern researchers.

After Bidāyat al-Mujtahid, I turned to Al-Muwāfaqāt and Al-Iᶜtiṣām of ash-Shāṭibī,[1] the great Andalusian, Mālikī

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[1] 'Ibrāhīm ibn Mūsā ASH-SHĀṬIBĪ, Al-Muwāfaqāt fī 'Uṣūl ash-Sharīᶜah, ed. ᶜAbd-Allāh Drāz, 4 vols. in 2 (Egypt: Al-Maktabah at-Tijārīyah al-Kubrā, n.d.); idem, Al-Iᶜtiṣām, 3 vols. (Egypt: Maṭbaᶜat al-Manār, 1331/1913).

Ash-Shāṭibī (d. 790/1388) was a Mālikī faqīh, muftī [one who gives legal opinions], and legal theorist of Granada. He was also highly regarded for his work as an Arabic philologist and grammarian, his extensive knowledge of ḥadīth, and his excellence as a Qur'ānic exegete. See Ziriklī,

legal theorist, and then to the works of al-Qarāfī[1] and al-Qāḍī ᶜIyāḍ,[2] because these works contained the most detailed and penetrating treatments of Mālikī legal theory

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1:71; and Kaḥḥālah, 1:118-119.

Ash-Shāṭibī is one of the most remarkable of all Islamic legal theorists. His work Al-Muwāfaqāt is a work of great originality and genius. It goes beyond traditional works on Islamic legal theory and, employing new methods of presentation, analyzes Islamic law as a whole in terms of its universal principles [kullīyāt] and ultimate purposes [maqāṣid]. It has been suggested to me that in writing Al-Muwāfaqāt, ash-Shāṭibī intended to initiate a new Islamic science of "maqāṣid ash-sharīᶜah" [the ultimate purposes of Islamic law] that would go beyond the scope of traditional legal theory ['uṣūl al-fiqh].

[1]'Aḥmad ibn 'Idrīs AL-QARĀFĪ, Adh-Dhakhīrah, ed. ᶜAbd-al-Wahhāb al-Laṭīf and ᶜAbd-as-Samīᶜ 'Imām, 1 vol. ([Cairo]: al-Jāmiᶜah al-'Azharīyah, Maṭbaᶜat Kullīyat ash-Sharīᶜah, 1381-/1961-).

Al-Qarāfī (626-684/1228-1285) was an Egyptian Mālikī faqīh and legal theorist of Moroccan Berber background. Like ash-Shāṭibī, he is one of the greatest and most original Islamic legal theorists. His Kitāb al-Furūq, for example, is a very valuable analysis of the fundamental precepts [al-qawāᶜid al-fiqhīyah] of Islamic law, their different scopes and purposes. See Ziriklī, 1:90; and Kaḥḥālah, 1:158-159.

Adh-Dhakhīrah, which unfortunately has not yet been fully published, is probably the most valuable compendium of Mālikī fiqh. The first volume contains a short but very meaningful treatment of legal theory. The remainder of the work pertains to specific questions of Mālikī fiqh. Al-Qarāfī compiled Adh-Dhakhīrah from over forty manuscripts of great Mālikī fuqahā' and legal theorists from Iraq, Andalusia, North Africa, Egypt, and Sicily. He gives the reasoning [al-'adillah] behind Mālikī opinions and compares them with the fiqh of the Companions, Successors, and early non-Madīnan fuqahā'. Al-Qarāfī uses Algebra to explain the laws of inheritance and astronomy to explain how to find the direction of the qiblah [direction of prayer]. See the Preface of Adh-Dhakhīrah.

[2]AL-QĀḌĪ ᶜIYĀḌ ibn Mūsā, Tartīb al-Madārik wa Taqrīb al-Masālik li-Maᶜrifat 'Aᶜlām Madhhab Mālik, ed. Dr. 'Aḥmad Bakīr Maḥmūd, 3 vols. (Beirut: Maktabat al-Ḥayāh, 1387/1967). (The early chapters of the first volume contain

I had found. There was a great advantage, I felt, in studying these works as a preliminary to analyzing Mālik's legal opinions. Ibn Rushd's Bidāyat al-Mujtahid had indicated the hypothesis to me that there was a real connection between later Mālikī theory and Mālik's original deductions. If nothing else, analyzing Mālik's legal opinions in the light of later Mālikī legal theory would check this hypothesis. It would give us a better idea of what degree of continuity, if any, there is between the method of Mālik's legal deductions and the speculations of later theorists. But in so far as Mālik's work itself was concerned, the speculations of later Mālikī legal theorists offered many valuable hypotheses in terms of which to analyze it. I have discussed the methodological problems of my approach in more detail in the Introduction. Briefly, however, I regard the hypothetical explanations of Mālikī theorists of Mālik's work to be as legitimate initially as any other hypotheses would be. Mālikī theorists advanced their theories to account for Mālik's reasoning. Thus, their hypotheses can be checked against the objective criterion of Mālik's legal opinions, which are the product of the reasoning that Mālikī theorists attempt to explain.

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discussions of some aspects of Mālik's legal theory.)

Al-Qāḍī ᶜIyāḍ (476 or 496-544/1083 or 1103-1149), a Moroccan of Andalusian background, was regarded as the greatest Mālikī faqīh and muḥaddith [one learned in ḥadīth] in his generation in Morocco. He was a qāḍī in Morocco and then for a time in Granada. He had extensive knowledge of Arabic, genealogy, and the history and poetry of the pre-Islamic Arabs. See Ziriklī, 5:282; and Kaḥḥālah, 8:16-17.

Acknowledgments

I would like first of all to acknowledge my gratitude to Dr. Fazlur Rahman, Dr. Wilferd Madelung, and Dr. Jaroslav Stetkevych for the excellent personal supervision, instruction, and training in working with Classical Arabic sources pertinent to my field of interest that they have given me during my graduate work at the University of Chicago. In general, furthermore, I have benefitted greatly from the overall excellence, openmindedness, and flexibility of the program of Islamic and Arabic studies in the Department of Near Eastern Languages and Civilizations, which enabled me throughout my second, third, and fourth years of graduate study at the University of Chicago to focus almost exclusively on course work and research in primary Arabic sources directly pertinent to my dissertation research.

I want to express my thanks especially to Dr. Fazlur Rahman Gunnaurī of Aligarh Muslim University and Dr. Mustafa Azmi of the College of Education in Riyadh, whom I met at the Seminar on *Ḥadīth* held in Chicago in July 1975 at the Illinois Institute of Technology under the sponsorship of the MSA [Muslim Students' Association of the United States and Canada]. I spent considerable time with both of them during the weeks they spent in Chicago that summer. I have benefitted especially greatly from advice of Dr. Fazlur Rahman Gunnaurī, particularly his recommendation

that I get a sound background in Islamic legal theory and study Ibn Rushd's Bidāyat al-Mujtahid and ash-Shāṭibī's Muwāfaqāt. Similarly, Dr. Azmi has continually given me encouragement and advice on my research. I am very thankful to him, furthermore, for the efforts he made to get me copies of the Masters theses of his students Nūr-Saif and ar-Rasīnī, which pertain to my dissertation topic and of which I have made much use.

I want to thank Dr. Prof. Hüseyin Atay of Ankara with whom I had many valuable discussions during his sabbatical leave at the University of Chicago in 1975-1976. We went over my research plans in detail. Dr. Atay gave me great encouragement in my research and, among other things, suggested to me that I study the works of al-Qarāfī.

I want to express my gratitude to Dr. Ismā'īl al Fārūqī of Temple University, who helped arrange for me to participate in the Conference of Islamic Jurisprudence held in Riyadh, October 24-November 2, 1976, and recommended me for the faculty appointment I received to teach Islamic studies in the Department of Religion at Temple University for 1977-1978. I benefitted greatly from the research and writing of the paper I prepared on Mālikī legal theory for the conference. It gave me a more exact definition of Mālik's concepts of istiḥsān [equity], sadd adh-dharā'i^{c} [the invalidation of legal fictions], and al-maṣāliḥ al-mursalah

[suspending established precepts or establishing unprecedented precepts on the basis of the absolute needs of society],[1] which enabled me to understand better how Mālik's conception of ᶜamal fit into the overall framework of his legal theory.

Furthermore, it would be difficult for me to estimate how much I benefitted from attending that conference and having the opportunity to discuss my dissertation and other questions of Islamic law with the highly trained fuqahā', professors, and scholars who attended it. I benefitted much from Shaikh Muḥammad al-Ḥabīb ibn al-Khōjah, muftī of Tunisia, who took out time from his schedule to discuss my dissertation with me privately. I am especially thankful to the Nigerian muftī Muḥammad al-Muntaqā al-Kishnāwī, from whose extensive knowledge of Mālikī and non-Mālikī legal works I benefitted greatly. He answered all my questions in detail, and it was he who indicated to me that Mālik's term "al-'amr ᶜindanā" [that precept which we regard as correct] did not stand for the 'ijmāᶜ [consensus] of Madīnah. In his opinion, this term was essentially Mālik's manner of indicating the preponderance [rujḥān] of his opinion that the precept to which it was applied was valid. Al-Kishnāwī also held that this term often, but not always, indicated the actual ᶜamal of Madīnah.

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[1]For more detailed treatment of these concepts see below , pp. 245-279.

Others whom I would like to thank for their encouragement and advice regarding my research are Shaikh ᶜAbd-al-ᶜAzīz ᶜUyūn-as-Sūd, chief muftī and head of the Qur'ān reciters of Syria, who took great interest in my dissertation and spoke to me about the great similarities between several fundamental points of Ḥanafī and Mālikī legal theory; Dr. Muṣṭafā 'Aḥmad az-Zarqā of the College of Islamic Law at the University of Jordan; and my very respected friend Shaikh Yūsuf al-Qaraḍāwī of the College of Education in Doha.

I want to thank my many brothers in Chicago who were always ready to help me financially and otherwise, especially Muhammad Badr, Shaikh Ahmad Zaki Hammād, Dr. Abd el-Raouf Oubaid, Irfan Ahmad, Atiqur Rahman, and Dr. Mazen Ulwan. I want to thank the MSA for its generous financial support during the year 1976-1977, and I want to thank my good friend Ibrahim Ahmad Aliyu Zaria of Abdullahi Bayero College in Kano for his efforts to assist me and his years of encouragement.

I want to thank my parents, Dr. and Mrs. D. E. Weinman, for the financial support and other help they have given me when needed. Finally, I want to thank my wife, Samīrah, and daughter, Īmān, for putting up with me during the years of my graduate study.

TABLE OF CONTENTS

PREFACE ii

Background to the Study ii
Acknowledgements viii

Chapter
I. INTRODUCTION 1

Scope and Purpose 1
An intellectual history of Mālik 1
Methodology 2
Mālik's legal opinions: the objective criterion 4
The subjective limitations of Mālikī legal theorists 6
Was Mālik aware of any system in his legal reasoning? 11
The distinction between concepts and terms 14
Thesis Statement 21

PART ONE
BACKGROUND: MĀLIK AND INTRODUCTORY MĀLIKĪ LEGAL THEORY

II. MĀLIK'S LIFE AND WORK 39

Mālik's Life 39
Mālik's teachers 46
Mālik's Madīnah: a brief background 48
Madīnah and the cultural centers of the outside world 59
Mālik's main teachers 62
Mālik's standards in selecting teachers 72
Mālik's Attitude toward Ḥadīth 76
Mālik as a Teacher and Muftī 85
Mālik's prestige in Madīnah 92

Mālik's Work 95
Mālik's Muwaṭṭa' 97
Al-Mudawwanah al-Kubrā 107
"Al-'Asadīyah" 111
Saḥnūn's Mudawwanah 112
"Al-Mawwāzīyah" 113
"Al-Wāḍiḥah" 117
"Al-ᶜUtbīyah" 118
Other Source Books 119

III. SOME PRELIMINARY FUNDAMENTALS OF MĀLIKĪ LEGAL THEORY 121

Introduction 121
"Classical Islamic legal theory" 121
Some general observations about Mālikī legal theory 129
The intricacy of Mālik's legal reasoning 129
Mālik's manner of elaborating the full scope of legal precepts . . . 135
The sources of this chapter 145
The Qur'ānic Text 146
The classification of legal texts according to their ambiguity 146
Regarding general statements in the Qur'ān 147
Regarding specific statements in the Qur'ān 148
Regarding the specification of general statements 151
The Sunnah 155
Mursal ḥadīth 155
The āthār and fatwā's of the Companions 161
Regarding the legal opinions of Successors 170
Isolated ḥadīth 170
Mālik's use of isolated ḥadīth by reference to other sources of law 179
The concept of ᶜumūm al-balwā 184
The ambiguity of isolated actions and specific rulings 188
Preliminary Reflections on 'Ijmāᶜ 195
Al-ᶜUrf wa 'l-ᶜĀdah: Local Customs and the Law 204
Analogical Reasoning: Qiyās 209
Introduction 209
A general analysis of analogical reasoning 212
Ash-Shāfiᶜī's concept of qiyās 216

Mālik and 'Abū Ḥanīfah: reasoning on the basis of legal precepts 226
Some special characteristics of Mālik's concept of qiyās. 234
The specification of Qur'ānic verses by qiyās. 234
Rejection of isolated ḥadīth on the basis of qiyās 237
Performing qiyās on the basis of earlier instances of qiyās 241
Istiḥsān. 245
Ḥanafī istiḥsān. 254
Illustrations of Mālikī istiḥsān 258
Sadd adh-Dharā'i^{c} 262
Illustrations of Mālik's application of sadd adh-dharā'i^{c}. 265
Al-Maṣāliḥ al-Mursalah. 268
Illustrations of al-maṣāliḥ al-mursalah 273
The distinction between al-maṣāliḥ al-mursalah and sadd adh-dharā'i^{c} and istiḥsān 275

PART TWO
MĀLIK'S CONCEPTION OF MADĪNAN ^{c}AMAL

IV. A SURVEY OF PERTINENT WRITINGS AND LITERATURE ON ^{c}AMAL 281

Modern Literature in Western Languages. . . 281
Theories on the original concept of sunnah and the practice of the early community. 285
Those who hold that there was no Prophetic sunnah 285
Those who hold that there was a Prophetic sunnah 288
Some general observations 292
Theories pertaining directly to Mālik and his legal method. 302
Theories on Mālik's terminology . . . 308
Modern Literature in Arabic 309
Al-Laith ibn Sa^{c}d and Early Polemical Writings 311
The letters of Mālik and al-Laith ibn Sa^{c}d. 311
Mālik's letter. 314
Al-Laith's response 321
'Abū Yūsuf's critique of the ^{c}amal of the Ḥijāz. 331

Ash-Shaibānī's polemics against the Madīnans. 337
Ash-Shāfi^cī's "Ikhtilāf Mālik" 341
Ash-Shāfi^cī on Madīnan 'ijmā^c 343
Ash-Shāfi^cī on isolated texts and reports of actions and rulings 348
Conclusions 353
A General Survey of Madīnan ^cAmal in Traditional Works on Legal Theory. . . . 356
Mālikī works 356
Ḥanafī works 358
Mu^ctazilī works. 359
Shāfi^cī works. 360
Ḥanbalī works. 363
Ẓāhirī works 367
Syllogistic logic and traditional argumentation 369

V. THE CONCEPT OF MADĪNAN ^cAMAL 379

The Importance of ^cAmal for Mālik 379
The Authority of Madīnan ^cAmal for Mālik. 382
The authority of ^camal as a unified legal code. 388
The need for legal codification and Mālik's refusal of al-Manṣūr 392
Mālik's Conceptualization of the Madīnan Community. 394
Mālik's conception of the legacy of the Madīnan ^culamā'. 403
The Different Categories of Madīnan ^cAmal. 409
Classifications of later theorists . . . 409
^cAmal derived from the sunnah 410
^cAmal derived from ijtihād. 415
Mālik's terminology and the classifications of later theorists. . 419
The difference between Madīnan ^camal and local customs 434
Theoretical Uses and Implications of Madīnan ^cAmal. 436
^cAmal as normative standard. 436
The obligations of the ^culamā' with regard to normative ^camal 448
The historical concern of the ^culamā' about irregular opinions. . . 453
The concept of ^camal and the legal status of habitual vs. isolated acts 459

Reports of isolated acts and
Mālik's concept of karāhiyah 465
The normativeness of ᶜamal and
Mālik's concept of maṣlaḥah 474
The Use of ᶜAmal in Conjunction with
Legal Texts 481
ᶜAmal and ᶜumūm al-balwā 481
ᶜAmal in conjunction with supporting
legal texts 484
ᶜAmal in conjunction with contrary
legal texts 487
ᶜAmal indicates abrogation 488
ᶜAmal distinguishes between
desired norms and exceptional
behavior 490
ᶜAmal naqlī in the absence of ḥadīth . . . 497
The possible effects of ᶜamal on
the transmission of ḥadīth 500
Ḥadīth in the absence of corresponding
types of ᶜamal 509

VOLUME TWO

PART THREE
ᶜAMAL IN THE MUWAṬṬA': AN EXAMINATION
OF THE RELATIONSHIP BETWEEN ᶜAMAL AND
MĀLIK'S TERMINOLOGY IN THE MUWAṬṬA'

VI. GENERAL COMMENTS ABOUT MĀLIK'S TERMINOLOGY . . . 516

Introduction 516
Some of the difficulties in studying
Mālik's terminology 517
Does Mālik actually have a systematic
terminology? 523
General Observations about Mālik's Terms . . . 529
The use of symbols 529
Why does Mālik use terms in the
Muwaṭṭa'? 530
What Mālik is reported to have said
about his terms 538
A Few Words about Terms in the Mudawwanah . . 545

VII. THE SUNNAH TERMS 549

General Observations about the Sunnah
Terms 549
Examples 552
1. S-XN: zakāh on gold and silver 552

2. S-XN . . . : no zakāh on fruit, provender, and greens 555
3. SthN-X: regarding bequests to one's heirs 557
4. SN: SNx̄-shkx̣&-X: the annulment of marriage by liᶜān 560
5. S-XN: regarding zakāh on inheritance . . 564
6. Mḍ̣S: regarding a plaintiff with one supporting witness 571
Conclusions 576

VIII. TERMS REFERRING TO THE PEOPLE OF KNOWLEDGE IN MADĪNAH 583

General Observations 583
Examples 585
1. -zĀIb: regarding the talbiyah in pilgrimage 585
2. -zĀIb: regarding the performance of ṭawāf 589
3. -zĀIb: regarding steeping dates and raisins 592
4. -zĀIN: regarding the waiting period of a pregnant woman whose husband dies 596
5. x̄dIb: regarding one who joins the Friday prayer late 599
6. x̄dIb: regarding husbands who cannot support their wives 602
7. x̄dIb: regarding the banishment of fornicators 606
Conclusions 608

IX. REFERENCES TO ᶜAMAL 614

General Observations 614
Affirmative ᶜAmal Terms 615
1. AlNs: paying for animals to be delivered at a later date 615
2. AlNs: the definition of what lands are suitable for musāqāh 618
3. AlNs: regarding the contract of mukātabah 623
4. The inheritance of heirs who perish in battles or calamities 626
Negative ᶜAmal Terms 629
1. Al-x̄: regarding sujūd al-Qur'ān 629
2. Al-x̄: ᶜUmar's letter to an army commander 632
3. Al-x̄: ᶜĀ'ishah on an abrogated Qur'ānic verse 636

4. Transactions of buying and selling and bai^c al-khiyār 640
5. AlN-x̄: ^cUmar and the slaves who stole a camel. 649
^cAmal Chapters 652
1. Alx: how one wipes over the shoes in performing mash 652
2. Alx: how one is supposed to sit while performing ṣalāh 656
3. Alx: S-XN: ^camal regarding ^cīd prayers. 658
4. Alx: how sacrificial camels are to be driven to pilgrimage 661
5. Alx: washing the bodies of martyrs before their burial. 665
6. Alx: sacrificing a sheep upon the birth of a child 668
7. Alx: the size of the diyah in gold and silver 673
Conclusions. 677
The affirmative ^camal terms 677
The negative ^camal terms. 679
The ^camal chapters. 685

X. 'AMR TERMS SUPPORTED BY LOCAL CONSENSUS 691

General Observations 691
Examples 693
1. AMN: regarding the use of a Magian's hunting dogs 693
2. AMN: a special provision for the testimony of youths 696
3. AMN: regarding inheritance due an illegitimate son 700
4. AMN: permission to alter bequests other than tadbīr 703
5. AMN: bequests to set free one's share of a jointly owned slave 708
6. Qasāmah. 713
Conclusions 723

XI. AL-'AMR ^cINDANĀ: AN 731

General Observations 731
AN and ^camal. 732
AN's Pertaining to Social Matters. 734
1. AN: no fixed indemnity for penetrating wounds to the body 734
2. AN: the indemnity for teeth that are knocked out 737

3. AN: regarding divorce and the pronouncement of ʿīlāʾ 741
4. AN: advancing the mukātab's deadline and reducing the amount 743
5. AN: capital punishment in conspiracies to commit murder 744
AN's Pertaining to Ritual and Worship 746
1. AN: recitation during prayer when praying behind an ʾimām 746
2. AN: conjugal relations with wives who bleed continuously 749
3. AN: regarding voluntary prayers 751
4. AN: the number of takbīrah's in ʿīd prayers 752
5. AN: takbīr after prayer during the days of tashrīq 754
Conclusions 756

Appendixes

I. ʾABŪ ḤANĪFAH'S RESTRICTIONS UPON THE ACCEPTANCE OF ISOLATED ḤADĪTH 761

II. SYMBOLS AND SPECIAL INDEXES FOR MĀLIK'S TERMINOLOGY IN THE MUWAṬṬAʾ 765

Table 1: Key to Symbols 766
Table 2: the Distribution of Terms According to Chapters 769
Table 3: Index to Sunnah Terms 778
Table 4: Index of References to the People of Knowledge 780
Table 5: Index to A-XN's 782
Table 6: Index to AMN's 783
Table 7: Index to AN's 784
Table 8: Index to Terms with ʿAmal and an-Nās 786
Table 9: Index to ʿAmal Chapters 788

SELECTED BIBLIOGRAPHY. 789

Traditional Sources 790
Modern Sources 794

بسم الله الرحمن الرحيم

هو الله في السماوات والأرض

I begin with the praise of God, Whose greatness is not diminished by lack of recognition, Whose grandeur is not increased by praising. Peace be upon God's last Prophet, Muḥammad ibn ᶜAbd-Allāh, abundant peace.

To the Granadan legal theorist,

AL-'IMĀM ASH-SHĀṬIBĪ,

and the memory of my great-grandfather,

Judge Charles L. Marmon.

CHAPTER I

INTRODUCTION

Scope and Purpose

An Intellectual History of Mālik

This dissertation is limited to the question of seeking to determine what Mālik conceived Madīnan ᶜamal [established legal practice] to be and how he applied that conception to specific points of law. I am not concerned in this dissertation with the broader questions of Madīnan social, economic, cultural, and political history that pertain to what, in fact, Madīnan ᶜamal was, whence it originated, and whether or not it had been kept in tact during the generations before Mālik.

Therefore, this dissertation is an intellectual history of Mālik. It is concerned with studying ᶜamal as an idea in Mālik's mind, not as a separate historical phenomenon. It is concerned only with how Mālik conceived of ᶜamal and not with the broader question of whether or not he was ultimately mistaken in his conception.

In this dissertation, I will present some of the arguments of fuqahā' of Mālik's time who disagreed with his conception of ᶜamal, who questioned its authenticity,

held that its source could not be verified, and doubted that it had been kept intact during the generations prior to Mālik. In conjunction with these arguments I will limit myself to trying to establish why Mālik regarded ᶜamal to be authentic, by what means he sought to verify its source, and how he sought to establish that it had been kept in tact; for these questions are a fundamental part of Mālik's conception of ᶜamal.

Methodology

No scholarly study can claim legitimately to be more conclusive than the degree of soundness of its methodology and the degree of accuracy and thoroughness with which that methodology has been applied. If any of these considerations is weak, the conclusions of the study can be no stronger. As al-Qarāfī has said:

> Whenever in a proof there is a premise which is negative, particular, or conjectural, the conclusion will be likewise. For a conclusion follows the status of its most lowly premise, and no regard is given at all to whatever illustrious ones also happen to be in its company.[1]

In the light of this I will set forth and defend in the following pages the methodology I have chosen to

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[1]Al-Qarāfī, 1:136. The Arabic text is:

«ومتى كان في الدليل مقدمة سالبة أو جزئية أو مظنونة كانت النتيجة كذلك، لأنها تتبع أخس المقدمات، ولا يُلتفت إلى ما صحبها من أشرافها.»

follow in this dissertation of analyzing Mālik's legal opinions in the light of later Mālikī legal theory. The question of how accurately I have applied this methodology is a question for the reader's judgment. In so far as thoroughness is concerned, this study is by no means exhaustive. Mālik's legal opinions are of great number and variety, and those which I have selected, although hopefully representative, are only a few by comparison.

Furthermore, if my assessment of overall Mālikī legal theory is correct,[1] it is, perhaps, the most intricate system of legal theory of the four major sunnī schools by virtue of the several points of legal theory to which it subscribes that are not common to each of the other schools. The principle of sadd adh-dharā'i^{c}, for example, is a clearly established concept in Mālik's legal theory and is shared with the Ḥanbalī school to the exclusion of the Ḥanafī and Shāfi^{c}ī. The numerous textual sources of law to which Mālik subscribes--for example, mursal ḥadīth [ḥadīth without full chains of transmitters] and āthār [the reports of statements, deeds, and tacit approvals of the Companions] in addition to the Qur'ān and musnad ḥadīth [ḥadīth with full chains of transmitters]--are recognized as valid by the Ḥanafī and Ḥanbalī schools, but not the Shāfi^{c}ī, which rejects the first two. Finally, the man-

[1]See Chapter Three on Mālik's legal theory for more complete discussion and documentation, see below, pp. 121-275.

ner in which Mālik interprets these textual sources by reference to his non-textual legal source of Madīnan ᶜamal is something quite distinctive to Mālik, even though it is recognized as valid under certain conditions by some Ḥanbalī legal theorists.

This intricacy of the system of Mālik's legal reasoning makes analysis of his legal opinions more complicated, especially in view of the fact that Mālik sets forth his legal reasoning only rarely. Thus, it is not an easy matter to determine in every instance how Mālik reached his conclusions, and there is considerable room for inaccuracy and error.

Mālik's Legal Opinions: the Objective Criterion

The methodological problem of how to approach the topic of this dissertation is made difficult by the fact that Mālik wrote nothing on legal theory, and there are no Mālikī works on his legal theory that go back to his time. Whatever comments Mālik did make concerning his legal reasoning are few and, even if authentic, tell us little.

First of all, it should not be assumed that Mālik did not have a legal theory or a systematic pattern of reasoning just because he did not write one down. It is possible, of course, that he wrote no such work and no early works on his legal theory have come down to us sim-

ply because he had no theory. But, on the other hand, it is conceivable that Mālik did have a legal theory but, for whatever reasons, did not write it down or teach it to anyone who wrote it down for him. It is also conceivable that he followed a consistent and predictable pattern of legal reasoning without ever having articulated it in theoretical terms.

What has come down to us are Mālik's numerous legal opinions. Any conclusions about whether or not he had a legal theory or a consistent pattern of legal reasoning must be based on analysis of this data. It is the objective criterion in reference to which hypotheses about Mālik's legal thought must be addressed. Even if Mālik had written on legal theory or even if there were early Mālikī works on legal theory available, their information would have to be examined by reference to the data of Mālik's legal opinions to see whether or not his theory had been implemented in fact. However, since objective data cannot be analyzed without hypotheses, absence of early works on Mālik's legal reasoning creates a handicap for the modern researcher, who must find adequate hypotheses for analyzing the data. Nevertheless, it is the data itself that ultimately contains the answer, similar to the verse:

Tilka āthārunā tadullu ᶜalainā/
Fa-'nẓurū baᶜdanā 'ilā 'l-āthāri
[These, the remnants we have left behind, tell you what we were,/ And so, when we are gone, consider the remnants we have left behind.]

The Subjective Limitations of the Mālikī Legal Theorists

Objective data does not speak for itself. Facts only have meaning when interpreted in terms of hypotheses that account for them in the most consistent manner and with the greatest degree of predictability. My method in this dissertation has been to put together hypotheses with which to analyze the objective criterion of Mālik's legal opinions on the basis of the writings of later Mālikī legal theorists. What, then, of the subjective limitations of those theorists?

Ibn Rushd, al-Qāḍī ᶜIyāḍ, al-Qarāfī, and ash-Shāṭibī, for example, were part of the Mālikī cultural heritage, and one would expect that they had an emotional attachment to that heritage. They were by profession qāḍī's and fuqahā' and legal theorists. One would imagine that they may have had personal interests in defending the Mālikī tradition against adversaries. How truly critical can they be expected to have been?

They were prominent and influential members of their societies. If in their time their societies had been faced with unprecedented social dilemmas, for example, might they not have been motivated to give Mālik's system of legal reasoning a different interpretation, if they felt traditional interpretations were too limited?

Furthermore, the Cordova, Granada, and Morocco of

Ibn Rushd, ash-Shāṭibī, and ᶜIyāḍ and the Cairo of al-Qarāfī were hardly identical to Mālik's second/eighth century Madīnah. Despite whatever sincerity and integrity these theorists might have had, can they be expected to have had an accurate understanding of Mālik's thought in view of the much different sociological backgrounds in which they had been enculturated? And what of the influence upon them of their economic class?

What degree of continuity can there be expected to have been between Mālik's thought and their theoretical speculations centuries later? What was the degree of influence upon these later legal theorists of philosophical ideas foreign to Mālik? To what extent is their work original, or to what extent does it merely reflect school doctrine evolved over the years? Finally, to what degree might their conclusions simply be erroneous?

The conclusion to be drawn from these considerations, I believe, is that no accounts by later Mālikī legal theorists of Mālik's system of legal reasoning can be regarded as valid until they have been examined against the objective criterion of Mālik's legal opinions. But, if upon examination against this objective criterion, they can be shown to account for Mālik's legal reasoning with a substantial degree of consistency, comprehensiveness, and predictability, they must be regarded as valid interpretations of Mālik's legal reasoning, as would other hypoth-

eses that could account for his legal reasoning with the same degree of consistency, comprehensiveness, and predictability. Furthermore, it is only to be expected that few, if any, hypotheses of Mālik's legal reasoning--whether they are from Mālikī legal theorists or modern researchers--would be proven to be absolutely conclusive. Absolute conclusiveness in hypotheses is rare even in physical and biological sciences, and such conclusiveness is much more rarely the case in hypotheses of a historical nature.

Fortunately, the works of Mālikī legal theorists--and I believe this applies to works of Islamic legal theory in general--lend themselves well to empirical examination. These theorists, as a rule, do not set forth their theories as types of kashf [ṣūfī intuitionalism]. Rather, their works claim to explain the legal reasoning of the major fuqahā' of their schools behind the specific legal conclusions those fuqahā' have drawn, and in keeping with this these works often contain numerous examples to support their theories.

It would be naive to approach the works of later Islamic legal theorists without taking into consideration their possible subjective limitations, such as I have referred to above. Nevertheless, the hypotheses contained in their works cannot be rejected justifiably only on the grounds of such possible limitations before they have been examined empirically. To deny their arguments any

relevance outrightly on the basis of their possible subjective limitations would be argumentum ad hominem. Arguments are proven neither valid or invalid by reference to the personal backgrounds of those who hold them. All hypotheses, regardless of whose they are, stand or fall on their own merits, in terms of how consistently, comprehensively, and predictably they explain the data on hand.

Thus, the hypotheses of later Mālikī legal theorists are to be judged by the standards used in modern research to judge any hypotheses. Subjective limitations apply potentially to all scholars. The modern scholar, for example, may be poorly prepared sociologically to interpret Mālik's legal opinions accurately in the context of second/eighth century Madīnah. Modern social, economic, political, and cultural life, in fact, is more foreign to that of Mālik's time than the life of the Cordova, Granada, Morocco, and Cairo of the Mālikī legal theorists I have mentioned. The modern researcher--Muslim or non-Muslim--has biases with which to contend. For both belief and disbelief constitute metaphysical--not empirical--positions and may greatly effect one's sense of cultural identification and one's attitude toward other cultures.

Certainly, the modern researcher is no less capable of making honest errors. And, although his critical sensibility may be well-developed, the modern scholar in some cases may be handicapped by certain philosophical assump-

tions that make it difficult for him to discern judiciously the great achievements of pre-modern civilizations. For example, the modern scholar may subscribe to the evolutionary assumption of primitivism, according to which he assumes a priori that peoples at an initial [primitive] stage of their cultural development must necessarily be less capable of great intellectual accomplishments than at a later [more advanced] stage, unless they are influenced by other peoples whose cultural heritages are older and more developed.

In conclusion, I have taken many hypotheses from Mālikī legal theorists, primarily because these hypotheses seemed to me to provide valuable new insights into Mālik's legal reasoning that merited further examination. However, I regard it as methodologically sound to elaborate upon or alter these hypotheses according to my analysis of the data of Mālik's legal opinions. Similarly, I regard it as equally sound to take hypotheses from other sources--for example, those of modern researchers--which I have done in several cases. Regardless of the sources of the hypotheses, their validity stands only by reference to the objective criterion of the legal opinions of Mālik to which they pertain.

Was Mālik Aware of Any System in His Legal Reasoning?

Even if the theories of later Mālikī legal theorists explain Mālik's legal opinions well, can we be sure that Mālik himself was conscious of any system in his thought that such theories bring to light? It seems to me that we cannot be certain that Mālik was conscious of any system in his legal reasoning in the absence of explicit statements by Mālik to that effect. Similarly, we cannot be certain that Shakespeare was conscious of the elaborate, systematic patterns of meaning, symbolism, and psychological insight that modern literary critics extrapolate from his plays.

Verification of whether or not Mālik was conscious of any system in his legal reasoning would be important to the intellectual history of Islamic legal theory, if it could be demonstrated that Mālik communicated that consciousness to others who then transmitted it to others, until it was finally written down and elaborated further. In the absence of indication that Mālik actually communicated such a consciousness to others, the fact of whether or not Mālik himself had such a consciousness is not very relevant to intellectual history, since that fact would then pertain to the subjective, uncommunicated realm of Mālik's consciousness and would not be the proper object of objective scholarship.

Nevertheless, it is very relevant to the intellectual history of Islamic law and legal theory to determine whether there is system to Mālik's legal reasoning, beyond the consideration of whether or not Mālik was conscious of that system. This is because coherent, systematic intellectual systems do, in fact, exist and, perhaps, even come into existence in advance of the terminologies and analytical elaborations that explain those intellectual systems systematically.

The Arabic language--which is an intellectual system, expressing thoughts and emotions and communicating fact by various systematic grammatical and syntactical relationships--possessed its mathematical precision and its special genius for forming words and formulating meanings centuries before Sībawaih,[1] the brilliant, young philologist, elaborated a grammar, syntax, and terminology that brought its system into clarity. Arabic poetry with its sixteen masterful patterns of rhythm had existed centuries

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[1] ᶜAmr ibn ᶜUthmān ibn Qanbar (148-180/765-796), known as "SĪBAWAIH" [a Persian diminutive for "fragrance of apples"] was a mawlā [non-Arab Muslim] of Persian background. He was born in Shīrāz; then moved to Baṣrah, where he became a student of the great philologist al-Khalīl ibn 'Aḥmad (100-170/718-786). Sībawaih is said to have had a speech impediment. Nevertheless, he is described as having been refined and very handsome. He died a young man, barely thirty years old. His great philological work, called "Kitāb Sībawaih" [the book of Sībawaih] is still studied widely and regarded by many Arab philologists as a work the likes of which was never compiled either before or after Sībawaih. See Zirikli, 5:252; and Kaḥḥālah, 8:10.

before Sībawaih's teacher, al-Khalīl ibn 'Aḥmad,[1] elaborated those patterns analytically.

Similarly, the theorems of geometry were worked out hundreds of years before Euclid elaborated his axioms, although Euclid's axioms are logically prior to the theorems they infer.[2] Aristotle (384-322 BCE), the father of classical logic, indicates that Zeno of Elea--a great dialectician of the fifth century BCE--had utilized many of the types of argumentation that Aristotle analyzed and classified. He also reports that his teacher's teacher, Socrates (470-399 BCE), had applied the principle of inductive reasoning, which Aristotle was also to analyze. But neither Zeno or Socrates is known to have done the much different thing, which Aristotle did, of elaborating a terminology, classification, and analytical theory of logic.[3]

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[1]AL-KHALĪL IBN 'AḤMAD ibn ᶜAmr al-'Azdī (100-170/718-786) was one of the great Arabic philologists of the school of Baṣrah, where he lived and died as a poor and little-known man. He had extensive knowledge of Arabic poetry and is regarded as the founder of ᶜilm al-ᶜarūḍ [the science of Arabic poetic metrics]. It is reported that al-Khalīl was walking through the streets of Baṣrah wrapped in thought of how to put together a system of numbers that would make computation easier for the people when he was accidentally trampled underfoot by mounted horsemen. He died shortly thereafter. See Ziriklī, 2:363; and Kaḥḥālah, 4:112-113.

[2]See Morris R. Cohen and Ernest Nagel, An Introduction to Logic and Scientific Method (New York: Harcourt, Brace & Co., 1939), p. 132.

[3]See The Encyclopedia of Philosophy, 1972 ed., s.v. "History of Logic."

The Distinction between Concepts and Terms

There is an important corollary to the preceding discussion that is of fundamental importance to the methodology of intellectual history. It is the fundamental distinction between concepts and the terms that stand for them.

There is no necessary connection between the choice of a term and the intellectual concept which that term is chosen to stand for. One may name a concept anything. One may choose a name for it that reflects perceptively a part or the whole of the idea which that concept embodies. On the other hand, one may select a name for a concept arbitrarily, such that there is no connection at all between what that name means literally and what the concept means for which it stands. One may name a concept "Barbara" or "X," "Y," or "Z," after the manner of symbolic logic.

Thus, convention always plays a role in the constitution of terminologies. Words become the terms for specific concepts, regardless of what those words mean literally, because people have the convention of associating those words with specific concepts. The literal meaning of the word chosen as a term may make that word especially attractive, if, for example, that literal meaning seems to capture the essence of what the concept means. Nevertheless, the literal meaning of the chosen word is

not in itself sufficient cause to determine that the people should come to select that word instead of another or that they should continue over the years to identify that word with the same concept for which it was originally chosen.

Thus, there is always a potential for arbitrariness in the constitution of terminologies. Two schools can share identical concepts and one of them call that concept by a certain name, while the other school calls it by yet another name. And, likewise, one school may call a concept by a certain name, while another school shares that concept yet calls it by no name at all. Similarly, a school may call a concept by one name in one generation and by another name in later generations, or it may alter the content of the concept to which that name was originally applied.

One conclusion to be drawn from this is that concepts and ideas exist prior to the terms that are given them, just as babies are born before they are named. And, to complete the metaphor, the literal meaning of the name given a baby will not necessarily characterize it.

A further implication of this observation which has bearing on Islamic intellectual history and the history of ideas in general is that students of intellectual history must search out and define concepts primarily and terms that stand for those concepts secondarily.

It is only the concepts that actually possess meaning. Hence, it is the concepts that possess observable characteristics, by virtue of their internal coherence [i.e. meaning], which determines that they be applied in concrete instances with a measure of consistency and predictability. The purpose of definition is to isolate and clarify those characteristics. Thus, once a concept has been properly defined it may be observed at work, so to speak, among the objective data. Thus, concepts must be the first object of study in an intellectual history.

Terms, on the other hand, by virtue of their potential arbitrariness, are too elusive to be the object of historical study until the concepts to which they are applied have first been defined and isolated. Once this has been done the history of a term may be discovered by analyzing the concepts to which it is applied. It may then be determined whether or not there is a close connection between the literal meaning of the term and the meaning of the concept to which it is applied; whether the term is applied consistently or inconsistently; whether or not there has been a change in the content of the concept to which the term is applied; and so forth. Thus, terms must be studied with reference to the concepts for which they are used, whereas it is methodologically unsound to study concepts with reference only to the terms that are used for them.

Furthermore, it is essential to study concepts first instead of terms, because concepts may exist, as I have indicated, before there is a terminology to identify them. As I have indicated in the preceding discussion, it may be the inherent nature of the evolution of intellectual systems that coherent ideas and concepts come into existence prior to the terminologies, classifications, and systematic theories that explain them.

Thus, if we choose to study, for example, the concept of sunnah [the authoritative and normative example of the Prophet] in the formative period of Islamic law, we must draw the distinction carefully between the application of that concept in concrete instances of law and the use or absence of use of the word "sunnah" and various combinations of it. It must be kept in mind, furthermore, that there are limitations to the conclusions that can be drawn on the basis of etymological studies of the word "sunnah" in the context of such a study. For the meaning of the concept of sunnah cannot be established by studies of the word's etymological origins or its use in pre-Islamic poetry. Such studies of the etymology of the word would be of value, however, once the concept itself had been studied independently, because it could then be shown what the nature of the connection between the two was.

In my study of Mālik's legal reasoning in this dissertation I am primarily concerned with the study of con-

cepts and with terminology secondarily. I am not concerned, for example, with whether or not Mālik used terms like "qiyās" [analogical reasoning], "istiḥsān," "sadd adh-dharā-'i^{c}," "al-maṣāliḥ al-mursalah," "ẓannī" [conjectural], "qaṭ^{c}ī" [definitive], and so forth, which are important parts of the terminologies of later Islamic legal theorists. I am concerned, rather, with defining the concepts these terms stand for and determining whether or not those concepts can be found to have been part of Mālik's system of legal reasoning. My study of Mālik's terminology in the Muwaṭṭa' is, therefore, essentially a study of the content and manner of presentation of the precepts to which those terms are applied. By this means I attempt to determine what is conceptually common among those precepts and, hence, what the terms mean and what they say about Mālik's concept of ^{c}amal.

It would be mistaken to conclude that the study of the history of terminologies is an insignificant part of intellectual history. On the contrary, the study of the historical development of terminologies and other aspects of theoretical analysis is of fundamental importance to intellectual history. Terms--as symbols--can make it easier for the human mind to indentify and work with concepts, whenever terminologies describe the conceptual systems to which they are applied accurately and comprehensively. And, inversely, terminologies and other types of theoret-

ical analysis that are foreign to or, for whatever reasons, imperfectly suited for describing the systems to which they are applied can impede the articulation of the full scope of those systems. (An example of this would be the strict application of the terms and syntactical rules of Latin grammar to English.) Thus, methodologically sound studies of the history of terminologies and other means of theoretical analysis can indicate the degree of consciousness of those who fashioned and used them. And such studies can indicate also how the development or adoption of inaccurate or otherwise unsuitable terminologies and analytical methods may have altered or impeded the perception of the intellectual systems to which they were applied.

I will present later my hypothesis that Aristotelian logic was an inadequate tool for analyzing certain parts of Mālikī and Ḥanafī legal theory, because of the heavy reliance in classical logic upon the universal syllogism, which is poorly-suited for examining propositions that pertain to the realm of probable inference. Several fundamental concepts in Mālikī and Ḥanafī legal theory, as I will show, pertain to the realm of probable inference. Hence, later Islamic legal theorists who were tied to the mode of syllogistic thinking and absolute deduction were unable to analyze and evaluate them properly.[1]

In summation, the linguistic ability to identify ideas, concepts, emotions, and things by name is one of

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[1]See below, pp. 369-379.

the key properties of human intelligence. As it is stated in the Qur'ān: "wa ᶜallama Ādama 'l-'asmā'a kullahā" [and (God) taught Ādam all the names (i.e. of things, emotions, concepts, and ideas)].[1] The degree of accuracy, consistency, and comprehensiveness with which man applies these names to the objects of the perceptual world determines whether they enhance or impede the quality of his perception. Thus, the study of the history of terminologies is important. It would be difficult to imagine, for example, the immense benefits to scholars of Islamic intellectual, social, cultural, and even economic and political history that would accrue from the compilation of a comprehensive Arabic dictionary on historical principles--like the Oxford English Dictionary--that would set forth in detail the historical development of the semantic range of Arabic terms and usages.

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[1]Qur'ān, 2:31. There are also other interpretations of the verse. Some hold, for example, that the referents of these "names" are animate things, such as mankind--i.e. Ādam's children--or animals. They hold this because the referents are referred to in subsequent verses as "hum", which means "them" but is used in Arabic syntax for animate objects of the masculine sex or for mixed groups of male and female. It might be argued, on the other hand, however, that the referents, although necessarily including animate objects, could include innanimate objects of perception as well. Under such circumstances the pronoun hum would still be most appropriate, because the group to which it refers is a mixed group containing animate objects of both sexes as well as inanimate things. Selection of the pronoun hum under such circumstances would be analogous to selection of it instead of hunna [they, them; feminine] for groups of mixed sexes.

Whoever or whatever the referents of the "names" may be, it is clear from the context of the verse that the key to Ādam's excellence, despite his having been created

Thesis Statement

This dissertation pertains to the early history of Islamic legal thought and the emergence of Islamic legal theory. It is essentially, as I have pointed out, an intellectual history of Mālik ibn 'Anas, concerned with his conception of the non-textual legal source of Madīnan ᶜamal [established legal practice], which he regarded to be very authoritative and upon which he relied extensively. Mālik is of primary importance in the formative period of Islamic law; his legal thought, which reflected the legal tradition of Madīnah in the Ḥijāz, came to constitute the basis of the Mālikī school of law, one of the largest and historically most influential sunnī schools. In several aspects, however, Mālik's method of legal thought stands in sharp contrast to the legal reasoning of his much younger contemporary, ash-Shāfiᶜī, who also has exercised immense influence upon the historical course of the development of Islamic law and who attacked Mālik's method of legal reasoning in his tract, "Ikhtilāf Mālik," to which considerable attention has been given in this dissertation.

In the first part of this dissertation I have attempted to give a comprehensive overview of Mālik's legal reasoning and the primary principles of law to which he subscribed--such as the concepts referred to in later legal terminology as istiḥ-

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from the elements of the earth, is his faculty of being able to know these "names". When the angels see that he has this knowledge, which in this case exceeds their own, they acknowledge Ādam's excellence by bowing before him.

sān [equity], sadd adh-dharā'i^{c} [the rejection of legal fictions], al-maṣāliḥ al-mursalah [the pursuit of social and individual benefits and needs for which there are no explicit legal texts], and his method of performing qiyās [analogical reasoning] on the basis of well-established precepts of law instead of explicit legal texts. I have given illustrations of Mālik's application of these types of legal reasoning, and I believe that there is sufficient evidence to warrant the conclusion that Mālik followed a coherent and predictable system of legal reasoning, although he is not known to have written anything about his method of legal thought down or to have given special instruction in it to his students. In view of this consideration that there was apparently a system to Mālik's legal thought, I have attempted to place Mālik's conception of ^{c}amal within the context of his overall legal reasoning. I have indicated, for example, that Mālik's concept of ^{c}amal may in some respects be cognate to his conception of the ultimate purposes in society of the principles of istiḥsān, sadd adh-dharā'i^{c}, and al-maṣāliḥ al-mursalah. For an important part of the Mālikī conception of Madīnan ^{c}amal was that it constituted a desired norm of social behavior in an Islamic society. Similarly, the function of the principles of istiḥsān, sadd adh-dharā'i^{c}, and al-maṣāliḥ al-mursalah was to preserve such a normative balance and transmit it to future times and changing circumstances.

Most of the research I have done regarding Mālik's con-

cept of ᶜamal has been based on the Muwaṭṭa'. I have also made much use of the Mudawwanah but to a lesser extent. The Muwaṭṭa' is very appropriate for study of Mālik's concept of ᶜamal, since it is essentially an ᶜamal source book, in which Mālik sets forth and elaborates the fundamental precepts of the Madīnan school of law as embodied in their ᶜamal. The Mudawwanah also contains a considerable amount of information on Madīnan ᶜamal, but it is to a much more considerable extent a record of Mālik's personal ijtihād done albeit with reference to the established ᶜamal of Madīnah but pertaining to matters that were without clear precedent and, hence, for which there was no clear solution within Madīnan ᶜamal. More extensive analysis of the Mudawwanah, therefore, would be required in a study of Mālik's personal ijtihād and his application of the principles of istiḥsān, sadd adh-dharā'iᶜ, al-maṣāliḥ al-mursalah, and so forth. Since the Muwaṭṭa' is primarily concerned with established ᶜamal, the role of Mālik's personal ijtihād in it is less than in the Mudawwanah.

In my study of the Muwaṭṭa', I have focused on analysis of the terminology which Mālik uses in it in his treatment of various ᶜamal precepts. Mālik's terminology deserves special attention, because it constitutes one of the most explicit and extensive statements we have from Mālik regarding his conception of Madīnan ᶜamal. Since many of the terms in Mālik's terminology are long and cumbersome, I have found it practical to devise a system of symbols for analyzing them. These symbols make the terms much easier to identify and work with.

Although Mālik's terms are a conspicuous part of the Muwaṭṭa', it must also be borne in mind that he cites no terms at all for the majority of the precepts set forth in the work. It appears to me that Mālik cites his terms generally in connection with precepts about which there had been significant differences of opinion among the fuqahā' of his and the preceding generations. Differences of opinion regarding these ᶜamal precepts for which terms are used come most frequently from the Kūfans--such as 'Abū Ḥanīfah and Sufyān ath-Thawrī.[1] In a number of instances, however, they do not come from the Kūfans at all but, rather, from various prominent Syrian, Egyptian, Yamanī, and other fuqahā'. Apparently it was the purpose of Mālik's terminology to clarify the status of Madīnan ᶜamal with regard to such controversial precepts.

I have reached the conclusion from my analysis of Mālik's terminology that the terms which he uses are not interchangeable and do not all stand for the same thing, as some modern scholars have suggested. At the same time, I do not believe that Mālik's terminology in the Muwaṭṭa' constituted a systematic terminology in the sense that each usage in it was assigned a limited terminological application which did not overlap with other terms in the system and to which that usage was consistently restricted. On the contrary, Mālik's terms appear to vacillate between their customary semantic

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[1]For data on ath-Thawrī, see below, p. 91, n. 1.

ranges in the Arabic idiom of Mālik's time and between assigned meanings which they tended to carry within the framework of his terminology. Hence, there is some overlapping between Mālik's terms. Nevertheless, the distinctive properties of his terms can be discerned by breaking them down into sets of what I have called "inclusive" and "exclusive" terms. Each of the terms includes properties common to the others; these are the areas in which they overlap and represent the "inclusive" aspect of Mālik's terminology. On the other hand, several of the terms exclude properties which are within the semantic scope of other terms which Mālik uses; this is what I refer to as the "exclusive" aspect of Mālik's terminology, and it is the "exclusive" aspects to which particular attention must be paid in order to determine the distinctive meanings of Mālik's terminology.

Apparently any term within Mālik's terminology can refer, for example, to ᶜamal precepts which, according to Mālik's conception, would have originated in the sunnah of the Prophet. The sunnah terms of the Muwaṭṭa', however--that is, those terms which include the word "sunnah"--appear from my analysis to be restricted to precepts which originated in the Prophetic sunnah or were pre-Islamic Madīnan customs which had received the Prophet's approval. Thus, Mālik's sunnah terms "exclude" those types of ᶜamal precepts in Madīnah which resulted from post-Prophetic ijtihād, for which other terms are used. Furthermore, Mālik's sunnah terms--interestingly enough--

have another distinctive property of being used in connection with ^{c}amal precepts which are contrary to analogy with related precepts of Islamic law. Indeed, the disagreements which arose among the early fuqahā' regarding these sunnah precepts had resulted from the fact that those who disagreed with them had not regarded the precepts in question to be anomalous and had extended the analogies of related precepts of law to include them. Although Mālik himself makes frequent use of analogical reasoning--as I have shown--he seems to be saying by citation of these sunnah terms in the Muwaṭṭa' that the ^{c}amal precepts to which they pertain are "off limits" to analogy and that, despite their anomalous nature, they are legitimate parts of Islamic law by virtue of the fact that they had been instituted under the aegis of Prophetic legislative authority. Thus, the anomalous nature of the sunnah terms represents another of their "exclusive" properties; other terms, such as AMN [al-'amr al-mujtama^{c} ^{c}alaihi ^{c}indanā; that precept upon which we have reached consensus], may include anomalous precepts but go beyond the exclusive aspect of the sunnah terms to include a large number of strictly analogous precepts.

In addition to including both anomalous and analogous precepts, the term AMN, which is the second most common term in the Muwaṭṭa', is also distinctive from the sunnah terms in that it includes precepts which resulted from post-Prophetic Madīnan ijtihād. AMN, therefore, can include the full semantic scope of the sunnah terms, while they in turn are excluded

from an extensive part of the much broader semantic range of AMN. I have shown isolated instances in the Muwaṭṭa' in which an emphatic sunnah term and the term AMN are used regarding the same precept. The sunnah terms in such instances, however, refer only to a limited part of such precepts, while the AMN refers to the precept in its entirety--i.e., both those aspects which originated in the sunnah and those which had been elaborated later through the ijtihād of Madīnan fuqahā'.

One of the most significant characteristics of Mālik's terminology, however, which I have been able to isolate, is the distinction it draws between those precepts of Madīnan ᶜamal which were supported by the local consensus of the Madīnan fuqahā' and those which were not. It is apparent, therefore, that Madīnan ᶜamal, generally speaking, and Madīnan local consensus were not the same thing, although they were regarded as such in the traditional and modern literature to which I have had access. According to my analysis, every instance of Madīnan local consensus was also part of Madīnan ᶜamal, but not every part of Madīnan ᶜamal was supported by Madīnan local consensus. In matters of law which came under the jurisdiction of the Madīnan judiciary or other types of executive authority in Madīnah, it was that executive authority itself which insured that such precepts would be incorporated into the general ᶜamal of the Madīnans, despite the fact that some of the Madīnan fuqahā' might have subscribed to them, while other Madīnan fuqahā' had not. Nevertheless, there are also

numerous precepts of Madīnan ᶜamal which were not supported by local consensus and did not come under the scope of any type of Madīnan executive authority. When there were differences of opinion among the Madīnan fuqahā' regarding such precepts, they probably would have become part of the general and widespread ᶜamal of the people by virtue of such factors as the greater social prestige among the Madīnans of those Madīnan fuqahā' who subscribed to them and taught and practiced them in their daily lives. Nevertheless, I have found instances of Madīnan ᶜamal precepts regarding which there was apparently some variety even within the ᶜamal of Madīnah. I have referred to such types of ᶜamal as "mixed" ᶜamal, because of the variations regarding them which existed even in Madīnah.

The term AN [al-'amr ᶜindanā; that precept which we follow; regard to be correct, etc.], which is the most common term in the Muwaṭṭa', is one of the terms which Mālik uses when referring to ᶜamal precepts which were not supported by Madīnan local consensus but which were, nevertheless, part of the general ᶜamal of the people. Terms like AMN, S-XN [as-sunnah al-latī lā 'khtilāf fīhā ᶜindanā; that sunnah regarding which there are no differences of opinion among us], A-XN [al-'amr al-ladhī lā 'khtilāf fīhi ᶜindanā; that precept regarding which there are no differences of opinion among us], and AMN-X [al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā wa 'l-ladhī lā 'khtilāf fīhi ᶜindanā; that precept regarding which we have reached consensus and regarding which there are no differences

of opinion among us], on the other hand, are terms which Mālik uses to indicate Madīnan local consensus. It appears, however, that Mālik may have had two types of consensus in mind. One of the distinctive properties of the wording of the terms S-XN, A-XN, and AMN-X, for example, is that they explicitly deny that there had been disagreements among the Madīnan constituents of consensus regarding the precepts to which they refer. The term AMN, on the other hand, while referring to Madīnan local consensus [ijtimā^{c}], makes no specific indication that there had been total agreement--i.e., complete absence of disagreement--regarding the precepts to which it refers. As I have shown, there is some evidence to support the hypothesis that AMN refers to a preponderant consensus of the Madīnan fuqahā' but not necessarily to a total consensus of them, which is indicated by terms like A-XN, S-XN, and AMN-X.

Although Mālik's terminology in the Muwaṭṭa' did not receive much attention in the traditional or modern literature on Islamic law to which I had access, traditional Islamic legal theorists did attempt to classify various types of Madīnan ^{c}amal, which they broke down into two main categories. The first consisted of those types of ^{c}amal which they conceived of as having originated with the Prophet or having won his approval. This type of ^{c}amal was referred to as "^{c}amal naqlī" [an ^{c}amal which transmitted, as it were, precepts of law from the Prophetic period]. The second category consisted of those types of ^{c}amal which resulted from the ijtihād of Madī-

nan fuqahā' in the post-Prophetic period. Some theorists divided this category of ᶜamal into two subdivisions: the first consisting of those types of ᶜamal which had resulted from the ijtihād of the Companions during the Madīnan caliphates, while the second consisted of types of ᶜamal that had resulted from ijtihād after the period of the Madīnan caliphate. The first of these subdivisions was referred to as "ᶜamal qadīm" [ancient ᶜamal]; the second was referred to as "ᶜamal muta'akhkhir" [later ᶜamal]. These theorists also claim that Mālik regarded ᶜamal naqlī to be conclusively authoritative, while he held ᶜamal which had resulted from ijtihād to be much less authoritative, especially that subdivision which had resulted from the ijtihād of Madīnan fuqahā' in the period after the Madīnan caliphate.

The concept of ᶜamal naqlī is clear in the Muwaṭṭa'. Nevertheless, Mālik's terminology does not correspond exactly to these categories which later theorists established, and Mālik reflects concerns which these theorists have not taken into account--such as, for example, the concern for indicating whether or not a precept was supported by Madīnan local consensus. Furthermore, there are numerous instances in the Muwaṭṭa' of ᶜamal precepts which would have been of the category of what later theorists referred to as ᶜamal naqlī yet regarding which there had been important differences of opinion among the prominent Madīnan fuqahā'. The question naturally arises of how Mālik could have regarded such ᶜamal precepts

to be authoritative and conclusive regarding which even prominent Madīnan fuqahā' had disagreed.

I have suggested that, in determining the relative authoritativeness of ᶜamal precepts regarding which there had been differences of opinion within Madīnah, Mālik was not solely concerned with considerations of the ultimate authenticity of such precepts but also with the practical demand of any workable legal system to take a definite position regarding conjectural matters of law so that an established and well-known system of laws can be set forth for judges to execute and the people to live with. Therefore, in evaluating the authoritativeness of such precepts, Mālik may also have taken into consideration the principle of maṣlaḥah [concern for the needs and benefits of society], which plays such an important role in Mālik's legal thinking. For it is one of the most fundamental social needs that there be a sufficient degree of fixity in a society's laws, and it would be very detrimental to society if conjectural matters of law, for instance, were to remain in a constant state of flux.

It might also be pointed out with regard to the classifications of ᶜamal in later legal theory, that Mālik often gives no clear indication in his terminology of the origin of Madīnan ᶜamal precepts, while this concern for origin reflects the chief concern of later classifications. Often it is very difficult to distinguish on the basis of the information which Mālik gives in the Muwaṭṭa' between those precepts

which resulted from ijtihād and those which were connected with the Prophetic sunnah. It is evident, furthermore, that Mālik was not concerned in his terminology with drawing a distinction between the ᶜamal qadīm and ᶜamal muta'akhkhir of later theorists.

Mālik's conception of the continuity of Madīnan ᶜamal is connected with his view of the excellence of the Madīnan community and, especially, their prominent fuqahā' from the time of the Prophet until his generation. Mālik emphasizes the fact that in the time of the Prophet the Madīnans were the direct recipients of his message and his specific injunctions; they witnessed the circumstances and conditions within which the message was first delivered. Hence, he believes that the knowledge of the Madīnans as a community was qualitatively superior to that of other communities, and he holds that the Madīnans had preserved the heritage of their forefathers well. Mālik often cites legal texts--ḥadīth and āthār--to indicate the continuity over the generations of various ᶜamal precepts. Occasionally, he uses analogical and other types of legal reasoning--such as reasoning on the basis of maṣlaḥah--to defend the validity of Madīnan precepts. Nevertheless, the prominent Madīnan fuqahā' constitute the chief reference by which Mālik establishes the content of ᶜamal and vouches for its continuity over the generations. Mālik conceived of them not only as the "carriers" of ᶜamal from one generation to another but also as the guardians of ᶜamal

within their own generations. It appears, furthermore, that Mālik regarded it to be a moral duty of the ᶜulamā' in general to see to the establishment and preservation of normative and properly balanced types of Islamic ᶜamal in the communities in which they lived.

One of the primary uses which Mālik makes of the non-textual source of Madīnan ᶜamal is to use it as the semantic context against which he interprets legal texts. Indeed, the Mālikī legal theorist ash-Shāṭibī regarded this to be one of the most important legal uses of ᶜamal. Thus, ᶜamal constitutes the frame of reference in terms of which Mālik interprets, sets aside, limits, or expands upon the textual sources of law to which he subscribes. Such use of ᶜamal as the semantic context for textual sources of law constitutes the greatest point of difference between Mālik and those who, like ash-Shāfiᶜī, rejected non-textual sources of Islamic law and restricted themselves to the semantic implications of the literal text. From Mālik's point of view, however, the sources of Islamic law, in order to be correctly interpreted, need to be studied in combination with the non-textual source of ᶜamal. Indeed, for Mālik the non-textual source takes priority, since Mālik sets aside those legal implications of texts which are contrary to ᶜamal.

It is important to bear in mind in this regard, as I point out, however, that Mālik and his student Ibn al-Qāsim do not generally question the authenticity of the legal texts

which they set aside because of their being contrary to ᶜamal. Ibn al-Qāsim emphasizes this point in the Mudawwanah, and, as I also point out, the ḥadīth upon which ash-Shāfiᶜī bases his contentions against the Mālikīs in "Ikhtilāf Mālik" are ḥadīth which Mālik himself has transmitted in the Muwaṭṭa' but which Mālik had interpreted much differently than ash-Shāfiᶜī by virtue of his having used ᶜamal as the semantic context of those ḥadīth.

By reference to Madīnan ᶜamal, for example, Mālik determines whether or not a text has been abrogated, his premise being that the ᶜamal of Madīnah reflects the latest practice which the Prophet had instructed his followers to adhere to. Hence, matters which had been abrogated during the course of the Prophet's life would have been taken out of practice and would not have been part of the ᶜamal of Madīnah. This use of ᶜamal as a reference by which to establish the fact of abrogation is cognate to the use of the āthār of the Companions in the Ḥanafī and Ḥanbalī schools for the same purpose--such āthār being essentially the textual record of the ᶜamal of the Companions in the post-Prophetic period.

When a legal text is contrary to ᶜamal yet there is no question of its having been abrogated, its legal implications are still regarded to be invalid according to Mālik and some Mālikī legal theorists. In such cases, ᶜamal is used to distinguish between texts which report normative actions or statements and those which report non-normative, unusual, or other-

wise exceptional matters, which should not be made normative by making their legal implications into ᶜamal. Similarly, ᶜamal is used within the Mālikī school to resolve other textual ambiguities, such as those which arise regarding the social capacity in which the Prophet made statements attributed to him: for example, his capacity as lawgiver, as a judge in a particular case, as the political head of state setting down policy for the immediate needs and objectives of the community, and so forth. Finally, as I point out, Mālik's reliance upon ᶜamal to set aside ḥadīth with contrary legal implications is cognate to 'Abū Ḥanīfah's rejection of isolated legal ḥadīth with unusual implications that pertain to matters of the nature of ᶜumūm al-balwā [general necessity]. The use of ᶜamal to distinguish between the normative and the exceptional also appears to be parallel to the historical concern among the early fuqahā' to follow what was well-known and put aside that which was irregular [shādhdh]. In this regard, Mālik's conception of ᶜamal would appear to be cognate to the early Ḥanafī concept of as-sunnah al-maᶜrūfah [the well-known sunnah].

I have also noted in my study of ᶜamal that there were no legal texts either for or against some of the most fundamental precepts of Madīnan ᶜamal regarding which there are clear indications that they were of the category of ᶜamal naqlī, i.e., ᶜamal which went back to the period of the Prophet. Similarly, in many instances of ᶜamal naqlī for which Mālik cites texts, those texts do not convey but a limited scope of

the entire precept to which they pertain. In such cases, Mālik elaborates the full scope of the ᶜamal precept by reference to the non-textual source of Madīnan ᶜamal. The absence of supporting texts for such types of ᶜamal lent support to the arguments of those like 'Abū Yūsuf, ash-Shaibānī, and ash-Shāfiᶜī--who doubted the authenticity and continuity of the Madīnan tradition and insisted that the Madīnans produce supporting legal texts to verify the validity of the ᶜamal precepts to which they subscribed. Nevertheless, the absence of legal texts either for or against such types of ᶜamal also raises an important historical question about the possible effect of ᶜamal on the transmission of ḥadīth. I have suggested the hypothesis that early muḥaddith's may, consciously or unconsciously, have relied upon ᶜamal as a criterion by which they determined which information most required to be transmitted by means of ḥadīth and which did not. Many of those precepts which were fundamental and well-known parts of public ᶜamal might have seemed sufficiently well-known and followed in practice that it seemed redundant and unnecessary to transmit ḥadīth and āthār about them. On the other hand, it would have been more important to transmit texts about those precepts which were less common and not so well-known.

Furthermore, ᶜamal may often have effected considerably the wording of those early Islamic legal texts which were transmitted. For often the semantics of such texts imply general familiarity on the part of the listener with the ᶜamal

about which they are speaking. Texts pertaining to well-known types of ᶜ<u>amal</u> such as the performance of prayer or of ritual ablutions, for example, sometimes appear cryptic and ambiguous in meaning to one who is not familiar with the general practice of how the Islamic rituals of prayer and ablutions are performed. On the other hand, such texts are quite clear to those who are acquainted with such practices. Thus, consciously or unconsciously, early Islamic ᶜ<u>amal</u> may have constituted the semantic context of the wording of early legal texts.

PART ONE

BACKGROUND:

MĀLIK AND INTRODUCTORY MĀLIKĪ LEGAL THEORY

CHAPTER II

MĀLIK'S LIFE AND WORK

Mālik's Life

Mālik ibn 'Anas was born in Madīnah between 90/708 and 97/715 and died there in 179/795.[1] Thus, Mālik lived from between eighty to eighty-seven years. His life was almost evenly divided between the 'Umayyad and ᶜAbbāsid periods. Mālik's entire upbringing and education were in Madīnah, and he did not follow the examples of many students of that period who travelled widely in search of knowledge. It is reported that Mālik never left Madīnah, in fact, except when performing the pilgrimage to Makkah. He learned from Madīnan scholars, lived according to the traditions of Madīnah, taught and elaborated the Madīnan school of law, and was regarded by his followers as the

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[1]Sezgin, 1:457; and Muḥammad 'Abū Zahrah, Mālik: Ḥayātuhū wa ᶜAṣruhū, Ārā'uhū wa Fiqhuhū (Cairo: Al-Maktabah al-Anglō al-Miṣrīyah, [1963]), pp. 24, 48.

In addition to this beneficial work on Mālik and his legal thought, 'Abū Zahrah has written useful biographies of 'Abū Ḥanīfah, ash-Shāfiᶜī, 'Aḥmad ibn Ḥanbal, and other prominent Muslim fuqahā'. He relies upon primary sources and includes chapters on the most important fuqahā' in the respective school and their works. He then discusses the legal theory of the school, which is one of the greater values 'Abū Zahrah's biographies offer. He takes the material for these chapters on legal theory from the most prominent legal theorists of the school but supports them by examples from original sources.

authoritative embodiment of that tradition. It seems symbolically fitting that Mālik is reported to have lived in the house of the Companion ᶜAbd-Allāh ibn Masᶜūd[1] and to have occupied the place in the mosque of Madīnah for teaching and giving legal opinions where ᶜUmar ibn al-Khaṭṭāb[2] had sat with his counsel of prominent Companions during the days of his caliphate.[3]

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[1]'Abū ᶜAbd-ar-Raḥmān ᶜAbd-Allāh ibn Masᶜūd (d. 32/653) was one of the most prominent Companions and among the first Makkans to embrace Islam. He was very close to the Prophet and is said to have been permitted to visit the Prophet in his house whenever he pleased. After the Prophet's death, Ibn Masᶜūd went to Kūfah, where he was put in charge of the public treasury and was a central figure in the establishment of what became the Kūfan school of law. During the caliphate of ᶜUthmān, Ibn Masᶜūd returned to Madīnah, where he died at about sixty years of age. (It is reported that Ibn Masᶜūd was an exceedingly short man, barely taller when standing up than a normal man sitting down. He also had a great love for wearing scented oils, and it is said that his neighbors could tell when he had left his house by the fragrance.)

ᶜAbd-Allāh ibn Masᶜūd is known for his extensive knowledge of Islam. Although regarded as a central figure in the origin of the Kūfan school of law, he is also an authoritative figure in the Madīnan school, although his role is much less central. See Ziriklī, 4:280.

[2]'Abū Ḥafṣ ᶜUmar ibn al-Khaṭṭāb (40 before <u>hijrah</u>-23/584-644) was one of the most prominent Companions and became the second caliph after the Prophet's death. He has become legendary among <u>sunnī</u> Muslims for his wisdom, justice, and great ability as a leader. He instituted the Islamic calendar; founded the cities of Baṣrah and Kūfah; was the first to establish a Muslim public treasury; and he instituted a system of <u>dīwān</u>'s [registries] according to Persian models.

He had been one of the notables of Quraish during the pre-Islamic period and had been one of their ambassadors. He is described as having been a strong and very tall man, thickly bearded, and partially bald. He had great knowledge of Islam and is regarded as a chief authority in the Madīnan school. See Ziriklī, 5:203-204.

[3]See 'Abū Zahrah, pp. 135, 17, 47; ᶜIyāḍ, 1:115.

Mālik's biographical sources do not give an elaborate picture of his childhood; they agree, however, that he began to study ḥadīth and other fields of Islamic learning pertinent to Islamic law at a very early age.[1] He progressed rapidly, selected his teachers carefully, and was regarded highly by his teachers. While still a young man, Mālik began to have his own circle of students and to give fatwā's [legal opinions]. One report has it that he began giving fatwā's at the age of seventeen.[2] Reports like this may well be exaggerated; it is clear, nevertheless, that most of Mālik's life was devoted to teaching the Madīnan school of law and giving fatwā's according to it. Since Mālik continued to teach and give fatwā's through his life, it is possible that he did it over a period of from sixty to seventy years.[3]

Mālik was of Yamanī Arab background on his father's side. His father's clan, Dhū 'Aṣbaḥ, are said to have been kings of the Yaman at one time. Mālik was of mawālī [non-

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[1]See 'Abū Zahrah, pp. 16-17.

[2]ᶜIyāḍ and 'Ibrāhīm IBN FARḤŪN, Ad-Dībāj al-Mudhahhab (full citations omitted) cited by 'Abū Zahrah, p. 42. 'Abū Zahrah doubts the accuracy of this report, on the basis that it is highly improbable--given the cultural attitudes of Madīnah--that Mālik could have had an independent circle until he had attained manhood.

ᶜIyāḍ cites several other reports that indicate that Mālik began to teach while a young man. One report has it that by the time Mālik was in his mid-twenties the people of Madīnah were generally following Mālik's opinions. Reports indicate that Mālik did not teach independently until he acquired recognition from Madīnan ᶜulamā'; see ᶜIyāḍ, 1:138.

[3]Cf. 'Abū Zahrah, p. 51.

Arab] background on his mother's side.[1]

Mālik had strong sympathies for the mawālī and insisted that they be given equal rights in all legal matters with Arabs. Ibn al-Qāsim[2] reports that Mālik objected to the opinions of those who held that the mawālī Muslims should not be regarded as equal in marriage ['akfā'] to Arab women. He regarded that opinion as a serious violation in the strongest terms ['a^{c}ẓama dhālika 'i^{c}ẓāman shadīdan] and supported his position by citing the verse:

> O mankind, We [i.e. God] have created you from a male and a female and have made you into nations and tribes that you come to know each other: the most noble of you before God is that of you who is most righteous. Verily, God is all-knowing and cognizant of each thing.[3]

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[1] ^{c}Iyāḍ, 1:102-105.

[2] ^{c}Abd-ar-Raḥmān IBN AL-QĀSIM al-^{c}Utaqī (128 or 132-191/745 or 749-806) was Mālik's most important student and the primary source for the Mudawwanah. He was an Egyptian like his contemporary Ibn Wahb (125-197/742-812), another major student of Mālik. Ibn al-Qāsim did not have the extensive knowledge of ḥadīth, however, that Ibn Wahb had. Nevertheless, Ibn al-Qāsim was a highly regarded faqīh in his own right. He studied with Mālik more than twenty years until Mālik's death. He made it a special point to write down and memorize Mālik's legal opinions, and it is said that he possessed something like 300 volumes [jald] of these legal opinions [masā'il]. Thus, Mālikī's regard him as the most important and reliable transmitter of Mālik's legal opinions. He was also an important transmitter of the Muwaṭṭa' and is said to have been the first to bring it to Egypt. See Sezgin, 1:465 and 'Aḥmad ibn ^{c}Alī IBN ḤAJAR al-^{c}Asqalānī, Kitāb Tahdhīb at-Tahdhīb, 12 vols. (Beirut: Dār Ṣādir, 1968), 6:252-253.

[3] Qur'ān, 49:13. Citation from Saḥnūn ibn Sa^{c}īd, Al-Mudawwanah al-Kubrā, 4 vols. (Cairo: Al-Maṭba^{c}ah al-Khairīyah, 1324/ [1909]), 2:144 (29). This edition referred to henceforth as Mudawwanah.

Ibn al-Qāsim interprets Mālik's position on equality in marriage as implying that any Muslim of good religious character has the right to seek the hand of a Muslim woman [thayyib] who is above him by virtue of noble descent [ḥasab] or social rank [sharaf]. If she is content with marrying him, the marriage shall be carried through even though her father or guardian [walī] refuse to sanction it. In that case, the matter of her marriage will be brought before the political authority [as-sulṭān], who shall see to it that her marriage is carried through despite the objections of her father or guardian.[1]

After mentioning that all people [an-nās kulluhum] are equal--Arab and mawālī--Ibn al-Qāsim states that Mālik supported this by the statement of ᶜUmar ibn al-Khaṭṭāb that, if he should live longer, he would see to it that the most lowly of people be given the status of the highest and most well-to-do [la-'in baqītu 'ilā qābil la-'ulḥiqanna 'asfal an-nās bi-'aᶜlāhum]. It was clear, Ibn al-Qāsim continues, that Mālik had an especially strong liking for another statement attributed to ᶜUmar ibn al-Khaṭṭāb:

> There is not a single Muslim but that he has a right to [part] of the wealth [of the public treasury] ['illā wa lahū fī hādhā 'l-māl ḥaqq], regardless of whether it be given him or denied him, even if he be a shepherd or shepherdess in ᶜAdan.[2]

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[1]Mudawwanah, 2:144 (29). [2]Ibid., 1:260 (12).

In so far as Mālik's appearance is concerned, his students--and among them ash-Shāfi^{c}ī--describe him as having been very striking. (His appearance may have contributed to the awe that sometimes amounted to fear which many of those who saw him had for him.[1]) He is described as having been tall and broad-chested. He was bald, had a wide forehead and a large, full beard and mustache--which, in imitating the example of ^{c}Umar ibn al-Khaṭṭāb, he never shaved off. Contrary to a common custom at that time, Mālik never dyed his beard even after it grew white. It is said that he had a well-shaped nose ['ashamm] and beautiful eyes. 'Abū Ḥanīfah would refer to him as "al-'azraq al-'ashqar" [the blue-eyed, blond-haired one]. It is said that Mālik's complexion was white.[2]

Mālik's habit was to wear the finest clothes; often he wore garments of dazzling white. He kept his house well-furnished for the comfort of his guests. Mālik used the most excellent quality of scented oils and musk. The ring on his finger when he died was an attractive silver ring with a black stone. Inscribed in it in two lines in a good Arabic script were the words: "ḥasbunā 'Llāhu wa ni^{c}ma 'l-wakīl" [God is sufficient for us, and what an excellent One is He upon Whom to place one's trust].[3] Mālik disliked

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[1]See below, pp. 86-90.

[2]^{c}Iyāḍ, 1:112-114. [3]Qur'ān, 3:173.

very much for those to wear shabby garments who could afford to dress nicely. He felt it especially important that people of learning dress well, since that brought greater respect to what they taught. He used to say:

> I do not like it that God should bestow His bounty on anyone and that the effect of that bounty not be seen upon him [i.e. in his manner of appearance], especially the people of knowledge.[1]

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[1] cIyāḍ, 1:112-114. It is likely, I believe, that Mālik's emphasis on fine appearance and attire for those who can afford it is directed against the spirituality of those extreme ascetics [zuhhād and nussāk] of his generation, many of whom frequented or lived in Madīnah, who made it a point of wearing patched wool garments [muraqqacāt] and who cared neither for their attire or appearance. 'Ibrāhīm ibn 'Adham of Khurāsān (d. ca. 174/790) was a prime representative of this type of spirituality. He belonged to Mālik's generation, and it is said that he came to Madīnah. Report has it that 'Ibrāhīm took pride in the number of lice in his coat. See Annemarie Schimmel, The Mystical Dimensions of Islam (Chapel Hill: U. of North Carolina Press, 1975), pp. 36-37.

It should also be noted, however, that there was a trend among early ṣūfī's toward estheticism and luxury as well. 'Abū Ḥafṣ al-Ḥaddād of Baghdād (d. 260/873), for example, represented this trend and emphasized the wearing of fine garments as well as the leading of a noble life. Al-Junaid (215-298/830-910)--possibly through the influence of al-Ḥaddād--dressed and lived well, and followed a middle course between the extremes of luxury and asceticism, which were prevalent among the ṣūfī's of his time. See Ali Hassan Abdel-Kader, The Life, Personality, and Writings of al-Junayd: A Study of a Third/Ninth Century Mystic with an Edition and Translation of His Writings, E.J.W. Gibb Memorial, New Series, no. 22 (London: Luzac & Co., 1962), pp. 30-31.

Al-Ḥasan al-Baṣrī (21-110/642-728)--an exemplar of Islamic piety in his day--apparently frowned upon the wearing of patched woolen, monk-like garments by ascetics and regarded it as a sign of hypocrisy. Similarly, al-Ḥārith al-Muḥāsibī (170-243/786-857)--the great ṣūfī of Baghdād--wore fine clothing himself and, like al-Ḥasan, seems to have regarded the wearing of the patched, woolen muraqqacāt as indicative of a subtle type of ostentation and pride. See Josef van Ess, Die Gedankenwelt des Ḥārit al-Muḥāsibī

Mālik's Teachers

Mālik's almost exclusive reliance upon Madīnan teachers is reflected by the fact that the 'isnād's of the Muwaṭṭa' come from Madīnan scholars, with the exception of twenty-three ḥadīth from six non-Madīnans. Mālik transmits eight ḥadīth from the highly regarded Makkan Successor 'Abū 'z-Zubair (d. 126 or 128/743 or 745).[1] He transmits another eight ḥadīth from the famous Baṣran student of al-Ḥasan al-Baṣrī,[2] Ḥumaid aṭ-Ṭawīl (68-142 or 143/687-759 or 760),

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anhand von Übersetzungen aus seinem Schriften dargestellt und erläutert (Bonn: Selbstverlag des Orientalischen Seminars der Universität Bonn, 1961), p. 44.

[1]'ABŪ 'Z-ZUBAIR Muḥammad ibn Muslim ibn Tadrus (d. 126 or 128/743 or 745) was a very significant Makkan Successor. He kept books of his ḥadīth and transmitted ḥadīth from numerous important Companions. Al-Laith ibn Saᶜd (94-175/713-791) was also one of his students. Sezgin, 1:86-87; and Yūsuf IBN ᶜABD-AL-BARR, Tajrīd at-Tamhīd limā fī 'l-Muwaṭṭa' min al-Maᶜānī wa 'l-'Asānīd: 'aw at-Taqaṣṣī li-Ḥadīth al-Muwaṭṭa' wa Shuyūkh al-'Imām Mālik (Cairo: Maktabat al-Qudsī, 1350/[1931]), pp. 155-157.

[2]AL-ḤASAN ibn Yasār AL-BAṢRĪ (21-110/642-728) was one of the most prominent of the Successors. The son of a Persian slave, al-Ḥasan was born and raised in Madīnah. He knew a great number of the Companions and later transmitted ḥadīth from them. He moved to Baṣrah, where he became widely known for his piety, knowledge, wisdom, and eloquence. Al-Ḥasan is very important in the formative period of Islamic kalām [theology] and mysticism. The two founders of Muᶜtazilah, Wāṣil ibn ᶜAṭā' (d. 131/748) and ᶜAmr ibn ᶜUbaid (d. 144/761), had been among his circle of students but broke off because of theological differences. Madelung has shown that there is great similarity between the teachings of al-Ḥasan and the five basic doctrines of the Muᶜtazilah. Al-Ḥasan also had the courage to speak out against the succession to power of Muᶜāwiyah's son, Yazīd. See Sezgin, 1:591-592; and Wilferd Madelung, Der Imām al-Qāsim ibn 'Ibrāhīm und die Glaubenslehre der Zaiditen,

who was one of the most highly regarded Successors in Baṣrah.[1] Mālik transmits two ḥadīth from another Baṣran, 'Ayyūb as-Sakhtiyānī, who was among the most highly regarded fuqahā' of that period.[2] He transmits three from the Khurāsānian, ᶜAṭā' ibn ᶜAbd-Allāh (d. 163/780).[3] Finally, Mālik transmits one ḥadīth from the Syrian 'Ibrāhīm ibn 'Abī ᶜUblah (d. 151 or 152/768 or 769)[4] and one ḥadīth from ᶜAbd-al-Karīm (d. 127/744)[5] of Northwestern Mesopotamia.[6]

Studien zur Sprache, Geschichte, und Kultur des Islamischen Orients, Neue Folge, Band 1 (Berlin: Walter de Gruyter, 1965), pp. 7-18.

[1]ḤUMAID AṬ-ṬAWĪL ibn 'Abī Ḥumaid al-Khuzāᶜī was a Baṣran mawlā. In addition to al-Ḥasan al-Baṣrī, Ḥumaid is reported to have studied with numerous other older Successors. It is reported that Ḥumaid wrote down all of al-Ḥasan's books. Sezgin, 1:89; Ibn ᶜAbd-al-Barr, pp. 26-28.

[2]'AYYŪB ibn 'Abī Tamīmah Kaisān AS-SAKHTIYĀNĪ (66-131/685-748) was an ascetic and much devoted to worship [zāhid, nāsik]. He had extensive knowledge of ḥadīth. He died in Baṣrah of the plague; Ziriklī, 1:382; Ibn ᶜAbd-al-Barr, p. 24.

[3]ᶜAṬĀ' ibn ᶜAbd-Allāh [or] Maisarah AL-KHURĀSĀNĪ was a mawlā probably of al-Muhallab ibn 'Abī Ṣufrah or the tribe of Hudhail. He came from Marv and was highly regarded as a muḥaddith and Qur'ānic commentator. He lived mostly in Damascus; Sezgin, 1:33; Ibn ᶜAbd-al-Barr, pp. 114-115; and Ibn Ḥajar, 7:212-215.

[4]Ibn ᶜAbd-al-Barr, pp. 12-13.

[5]'Abū Saᶜīd ᶜABD-AL-KARĪM ibn Mālik AL-JAZĪRĪ was a mawlā probably of Marwān ibn al-Ḥakam. He lived and died in Ḥarrān and was highly regarded. He studied under Ibn 'Abī Lailā (74-148/693-765); Ibn ᶜAbd-al-Barr, p. 107.

[6]Cf. 'Abū Zahrah, p. 51.

The fact that Mālik transmitted these twenty-three ḥadīth from non-Madīnan scholars--albeit prominent non-Madīnans--is worthy of note. It indicates that Mālik did not limit himself exclusively to Madīnans and, thus, must have regarded qualified non-Madīnan teachers as acceptable. Nevertheless, twenty-three ḥadīth is a very small proportion of the entire number of ḥadīth Mālik transmits in the Muwaṭṭa', the remainder of which come from Mālik's Madīnan teachers. Before taking a look at Mālik's primary teachers, it is worth considering briefly whether or not Mālik's reliance upon Madīnan teachers would have been likely to limit his knowledge significantly of ḥadīth and other types of learning pertinent to Islamic law. Furthermore, it is important to consider whether or not Mālik's not having travelled to or lived in regions outside Madīnah--except for his performing the pilgrimage to Makkah--would have been likely to put serious sociological limits on his knowledge of and appreciation for the problems of Muslim peoples whose cultures differed from that of the Ḥijāz.

Mālik's Madīnah:
a brief background

During the first forty-one years of the Islamic era, Madīnah had been the religious and political center of the world of Islam. The Prophet had established his state there, and the governments of the first four caliphs had been in-

augurated there. The last of these, ᶜAlī ibn 'Abī Ṭālib,[1] made Kūfah the center of his political and military activities. Some historians doubt, though, that ᶜAlī intended by that to shift his capital to Kūfah permanently and hold, instead, that his moving to Kūfah was a temporary tactic in his strategy against Muᶜāwiyah.[2] When, after ᶜAlī's

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[1]'Abū 'l-Ḥusain ᶜALĪ IBN 'ABĪ ṬĀLIB ibn ᶜAbd-al-Muṭṭalib (23bh-40/600-661) was one of the most prominent and historically most significant of the Companions. He was the Prophet's paternal cousin and, later, son-in-law. The Prophet, who was an orphan, had grown up as a young boy under the protection of 'Abū Ṭālib, ᶜAlī's father; the Prophet in turn--many years ᶜAlī's senior--played a large role in ᶜAlī's upbringing. When the Prophet received his call, ᶜAlī was quick to believe in him and, hence, is regarded as the first youth to have become a Muslim. He was one of the Prophet's major supports during his life. ᶜAlī is reported to have been persuaded to accept the caliphate after the assassination of the third caliph, ᶜUthmān (47bh-35/577-656). ᶜAlī then put together a wide coalition of supporters from very diverse, if not contradictory, social and economic backgrounds and interests. With difficulty, he was able to keep that coalition together for a surprisingly long time, perhaps because of his clear, relevant, and decisive political positions and his charismatic personality. The coalition began to break up first upon ᶜAlī's acceptance of arbitration with Muᶜāwiyah at Ṣiffīn (37/657); the breakaways later planned and executed ᶜAlī's assassination. It is noteworthy that the 'Anṣār [Muslims native to Madīnah] supported ᶜAlī unwaveringly until his death. Zirikli, 5:107-108; and M. A. Shaban, Islamic History, A.D. 600-750: A New Interpretation (Cambridge: University Press, 1976), pp. 71-73.

[2]Shaban, p. 73.

MUᶜĀWIYAH ibn 'Abī Sufyān ibn Ṣakhr ibn Ḥarb ibn 'Umayyah (20bh-60/603-680) was a Companion of the Prophet, having become a Muslim in 8/629 upon the capitulation of Makkah. The Prophet is reported to have used him as a scribe. ᶜUmar ibn al-Khaṭṭāb during his caliphate made Muᶜāwiyah the governor [wālī] of Jordan; then, having recognized Muᶜāwiyah's great ability, appointed him governor of Damascus upon the death of its former governor, Muᶜāwiyah's brother, Yazīd ibn 'Abī Sufyān. ᶜUthmān, the third caliph, made Muᶜāwiyah the

assassination, Mu^{c}āwiyah established himself as the head of the Islamic empire in Damascus in 41/661, the days of Madīnah's political hegemony had come to an end. ^{c}Abd-Allāh ibn az-Zubair's[1] revolt against 'Umayyad political rule in 64/683 sought, among other things, to restore the political supremacy of the Ḥijāz by making it again the seat of the caliphate.[2] When after his caliphate of nine years, Ibn

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governor of all Syria. In the years ahead, Mu^{c}āwiyah was able to make Syria a strong and dependable power base for himself. During the stalemate between Mu^{c}āwiyah and ^{c}Alī that resulted after their confrontation at Ṣiffīn, Mu^{c}āwiyah continued to rule in Syria, while ^{c}Alī ruled in ^{c}Iraq until his assassination. In 41/662, after ^{c}Alī's death, Mu^{c}āwiyah became the head of the Islamic empire and established thereby the 'Umayyad dynasty. Mu^{c}āwiyah was a very able statesman, and the Islamic empire was consolidated and expanded considerably under his leadership. He was known for his shrewdness, his eloquence, his patience, and his readiness to forgive and reconcile his enemies. Ziriklī, 8:172-173.

[1]'Abū Bakr ^{c}ABD-ALLĀH IBN AZ-ZUBAIR ibn al-^{c}Awwām (1-73/622-692) is reported to have been the first Muslim child born in Madīnah after the hijrah. He established his caliphate in 64/683 after the death of Mu^{c}āwiyah's son Yazīd. Although Madīnah came under Ibn az-Zubair's control, he made instead the sanctuary of Makkah, further to the south, his capital. Ibn az-Zubair's revolt posed a serious threat to the 'Umayyads. At the height of his power, Ibn az-Zubair held control over Egypt, the Yaman, Khurāsān, Iraq, and much of Syria, in addition to the Ḥijāz. His caliphate was finally crushed by al-Ḥajjāj ibn Yūsuf (40-95/660-714), the stern, energetic, and tenacious 'Umayyad lieutenant. Ziriklī, 4:218.

[2]See Syed Salman Nadvi, "^{c}Abd Allāh Ibn Al-Zubair and the Caliphate" (Ph.D. dissertation, University of Chicago, 1972), p. 105; Ḥasan 'Ibrāhīm Ḥasan, Tārīkh al-'Islām as-Siyāsī wa 'd-Dīnī wa 'th-Thaqāfī wa 'l-Ijtimā^{c}ī, 4 vols. (Cairo: Maktabat an-Nahḍah al-Miṣrīyah, 1961), 1:287; and 'Aḥmad Shalabī, At-Tārīkh al-'Islāmī wa 'l-Ḥaḍārah al-'Islāmīyah: Dirāsah Taḥlīlīyah Shāmilah li-'t-Tārīkh al-'Islāmī wa 'l-Ḥaḍārah al-'Islāmīyah fī Jamī^{c} al-^{c}Uṣūr wa Jamī^{c} al-'Anḥā', 6 vols. (Egypts Maktabat an-Nahḍah al-Miṣrīyah, 1966), 2:65-67.

az-Zubair was finally defeated, his defeat was the political defeat of the Ḥijāz. Never again in the classical period would its political supremacy be restored.[1] During Mālik's middle years, when the ᶜAbbāsids came to power, less than a century after Muᶜāwiyah had established himself in Damascus, the political center of the world of Islam shifted to Iraq in the northeast, where in the year 145/762, 'Abū Jaᶜfar al-Manṣūr,[2] the second ᶜAbbāsid caliph, began the designing of his new and beautiful capital, Baghdad.

The shift of political power from Madīnah must, no doubt, have effected Madīnan economic and social life. Madīnah remained, nevertheless, a cultural center where poets and poetry flourished for sometime after Ibn az-Zubair.[3] Even more significantly, Madīnah remained the chief center of Islamic learning well into Mālik's time. ᶜUlamā' [people of religious learning] continued to congregate there, con-

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[1]Ḥasan, 1:416; and Shalabī, 2:65-67.

[2]'ABŪ JAᶜFAR ᶜAbd-Allāh ibn Muḥammad ibn ᶜAlī ibn al-ᶜAbbās ibn al-Muṭṭalib, known as AL-MANṢŪR [the victorious] (95-158/714-775) was the second ᶜAbbāsid caliph, having taken power after the death of his brother, as-Saffāḥ (d. 136/753). Al-Manṣūr is the paternal ancestor of all the ᶜAbbāsid caliphs. His own rule lasted twenty-two years and, hence, covered a good part of Mālik's adult life. Al-Manṣūr is said to have been serious and contemplative by nature. He took great interest in diverse types of knowledge and had much love for the ᶜulamā'. In addition to fiqh and Arabic literature, al-Manṣūr had an interest in the Greek and Persian sciences, philosophy and astronomy. Ziriklī, 4:259.

[3]Shalabī, 2:65-67; Ḥasan, 1:535-536. Affluence was widespread during the 'Umayyad period; Madīnah long remained an "aristocratic" center of Arabs of high social standing, many of whom lived as elegantly as princes. See Ḥasan, 1:414-415; 540.

siderably more free--one might expect--of governmental prying and political intrigue than they might have been, had Madīnah remained the center of empire. Students from all parts of the Islamic world continued to come to Madīnah to seek knowledge from its ᶜulamā'.[1] Ibn Taimīyah[2] holds that no center of Islamic learning in the early period claimed to vie with Madīnah before the death of ᶜUthmān[3]. It was

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[1]See Nabia Abbott, Studies in Arabic Literary Papyri, vol. 1: Historical Texts; vol. 2: Qur'ānic Commentary and Tradition; vol. 3: Language and Literature; 3 vols., University of Chicago Oriental Institute Publications, vol. 76 (Chicago: University of Chicago Press, 1967), 2:24, 188; Fazlur Rahman, Islam (Garden City, N.Y.: Doubleday & Co., 1968), p. xviii, 99.

[2]Taqī-ad-Dīn 'Aḥmad ibn ᶜAbd-al-Ḥalīm IBN TAIMĪYAH (661-728/1263-1328) was one of the most significant Islamic thinkers and a copious writer. He was a Ḥanbalī from a family that had produced great Ḥanbalī ᶜulamā'. The writings of Ibn Taimīyah have had considerable influence upon premodern and modern Islamic revivalists. Ibn Taimīyah lived primarily in Damascus, although he also spent years in Egypt--much of them in prison. He was outspoken and courageous and frequently imprisoned because of his unpopular fatwā's that condemned contemporary practices and superstitions. He died in prison in Damascus. Ziriklī, 1:140-141; Kaḥḥālah, 1:261-262.

[3]ᶜUTHMĀN ibn ᶜAffān ibn 'Abī 'l-ᶜĀṣ ibn 'Umayyah (47 bh-35/577-656) was one of the most prominent Companions. He became the third caliph in 23/643 after the assassination of ᶜUmar ibn al-Khaṭṭāb. ᶜUthmān was a wealthy and highly born member of Quraish but was among the first of the Makkans to embrace Islam. The policies he pursued--especially that of appointing (well-qualified) relatives to positions of political authority--led to hot controversies during the last six years of his twelve year caliphate, which finally culminated in his assassination. ᶜUthmān probably made these changes in policy to establish greater centralization in an empire that had expanded rapidly, producing immense social and economic changes and potentially very dangerous conflicts of social and economic interests. See Martin Hinds, "The Murder of the Caliph ᶜUthmān," IJMES 3(1972), pp. 450-469; Idem,

during the course of the political and sectarian divisions that arose in the years following ᶜUthmān's assassination that there first appeared those who claimed that the ᶜulamā' of Kūfah were comparable to those of Madīnah. Even then, Ibn Taimīyah continues, no city in the early period--other than Kūfah--felt it could be independent of Madīnah in matters of legal and religious knowledge.[1] Historical reports from the early ᶜulamā' indicate that into the time of Mālik the greatness of a scholar from outside Madīnah was often measured in proportion to how much of his knowledge he had received from the ᶜulamā' of Madīnah.[2] 'Abū Yūsuf[3] had studied under great Madīnan ᶜulamā' like Hishām ibn ᶜUrwah ibn az-Zu-

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"Kūfan Political Alignments and Their Background in the Mid-Seventh Century A.D.," IJMES 2(1971), pp. 346-367; Shaban, pp. 60-68; and Ziriklī, 4:371-372.

[1]Taqī-ad-Dīn 'Aḥmad IBN TAIMĪYAH, Ṣiḥḥat 'Uṣūl Madhhab 'Ahl al-Madīnah, ed. Zakarīyā ᶜAlī Yūsuf (Cairo: Maṭbaᶜat al-'Imām, 1964), p. 30.

[2]See 'Aḥmad Muḥammad Nūr-Saif, "ᶜAmal 'Ahl al-Madīnah baina Muṣṭalaḥāt Mālik wa 'Arā' al-'Uṣūlīyīn" (M.A. thesis, King ᶜAbd-al-ᶜAzīz University, Mecca, Saudi Arabia, 1391-92/1971-72), p. 24.

[3]'ABŪ YŪSUF Yaᶜqūb ibn 'Ibrāhīm (113-182/731-798) was a Kūfan and one of the most important followers of 'Abū Ḥanīfah, under whom he studied as well as under the Kūfan faqīh Ibn 'Abī Lailā. 'Abū Yūsuf had been poor during the early years of his study, and 'Abū Ḥanīfah supported him and his entire family generously from his private wealth for a considerable time. Toward the end of his life, 'Abū Yūsuf was appointed a qāḍī of Baghdād. He kept that office until his death and was the first in Islamic history to have been called qāḍī al-quḍāt [chief judge]. Sezgin, 1:419.

bair,[1] who was one of Mālik's teachers also. Ash-Shaibānī[2]--who among 'Abū Ḥanīfah's followers was perhaps the most influential in establishing the Ḥanafī school of law--studied under Mālik in Madīnah and transmitted a recension of Mālik's Muwaṭṭa'.[3]

Ibn Taimīyah points out that the early ᶜAbbāsid caliphs held the ᶜulamā' of Madīnah in high regard. Al-Manṣūr requested many of the most prominent Madīnan ᶜulamā'--among them several of Mālik's teachers--to come to Iraq to spread knowledge there. (I will discuss later in this chapter reports that al-Manṣūr requested Mālik to compile the Muwaṭṭa'

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[1]HISHĀM IBN ᶜURWAH ibn az-Zubair ibn al-ᶜAwwām (61-146/680-763) was one of Mālik's teachers and a very prominent Madīnan muḥaddith and faqīh. He is said to have known several Companions and transmitted ḥadīth from his father--the famous Madīnan faqīh ᶜUrwah ibn az-Zubair (23?-94/643?-712)--his paternal uncle, ᶜAbd-Allāh ibn az-Zubair, and az-Zuhrī (51-124/671-741), who was one of Mālik's most important teachers. Al-Manṣūr brought Hishām ibn ᶜUrwah to Baghdād in 146/763, but Hishām died shortly thereafter. Sezgin, 1:88-89.

[2]MUḤAMMAD IBN AL-ḤASAN ibn Farqad ASH-SHAIBĀNĪ (132-189/749-805) began to study under 'Abū Ḥanīfah at the age of fourteen. He studied also under the famous Kūfan muḥaddith and faqīh Sufyān ath-Thawrī (ca. 96-161/ca. 714-778), the Syrian al-'Awzāᶜī (ca. 88-157/ca. 707-774), and Mālik. His primary teacher, however, was 'Abū Yūsuf, who had a great influence upon him. Ash-Shaibānī was also very learned in Arabic philology and is one of the most important founders of the Ḥanafī school by virtue of his vast writings. Sezgin, 1:421.

[3]Muḥammad ibn al-Ḥasan ash-Shaibānī, transmitter, Muwaṭṭa' al-'Imām Mālik by Mālik ibn 'Anas, ed. ᶜAbd-al-Wahhāb ᶜAbd-al-Laṭīf (Cairo: al-Majlis al-'Aᶜlā li-'sh-Shu'ūn al-'Islāmīyah, 1387/1967).

in order that he make it a legal standard in his empire.[1]) Ibn Taimīyah holds that Madīnah continued to have such prestige in matters of Islamic law and ḥadīth until after Mālik's death, when the newly founded Baghdad and the great centers of learning that were growing up in Khurāsān, Andalusia, and North Africa began to compete with it.[2]

It might also be pointed out that in addition to being an important center for the knowledge of ḥadīth and fiqh during this period, Madīnah was the center of an important school of Islamic historical writing. Kūfah and Baṣrah, during the same period, were centers for the transmission of Arab tribal traditions and the famous "Battle Days" literature ['Ayyām al-ᶜArab] of the pre-Islamic Arabs.[3]

Thus, Mālik's Madīnah would have been able to provide him with a rich milieu in which to receive his education in matters pertaining to Islamic law. Even so, az-Zuhrī[4]

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[1]See below, pp. 99-102, 392-394.

[2]Ibn Taimīyah, pp. 26, 32-33. [3]See Nadvi, pp. 6-7.

[4]'Abū Bakr Muḥammad ibn Muslim ibn ᶜUbaid-Allāh IBN SHIHĀB AZ-ZUHRĪ (ca. 54-124/ca. 674-742) was among the greatest scholars of his generation and was a central figure in the movement toward the close of the first/seventh century to compile ḥadīth. He was influential in spreading the use of 'isnād's and accurate manuscripts. He received his learning from many Companions and older Successors. In addition to being a great faqīh and muḥaddith, az-Zuhrī was also a noted historian and was well-versed in poetry. Although he used writing in the transmission of ḥadīth, az-Zuhrī was famed for his highly retentive, photographic memory. Sezgin, 1:280-284, 56-57; Abbott, 2:25-26, 30-35, 52-53; and Mohammad Mustafa Azmi, Studies in Early Ḥadīth Literature: with a Critical Edition of Some Early Texts (Beirut: al-Maktab al-'Islāmī, 1968), pp. 278-292.

as well as others of the prominent ᶜulamā' of Madīnah had expert and extensive knowledge of the ḥadīth of centers of Islamic learning outside Madīnah. The great Madīnan Successor Saᶜīd ibn al-Musayyab,[1] who lived during the generation prior to Mālik's birth and was one of the main teachers of az-Zuhrī, is reported to have spent great effort in travelling from place to place in the search for knowledge of ḥadīth. According to Ibn Rushd [al-Jadd],[2] it was by virtue of these efforts that Saᶜīd ibn al-Musayyab came to be regarded as the most knowledgeable man of his generation and was called by some "sayyid at-tābiᶜīn" [master of the Successors].[3]

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[1] 'Abū Muḥammad SAᶜĪD IBN AL MUSAYYAB al-Makhzūmī (ca. 14-94/ca. 635-713) was probably the most prominent and influential Madīnan faqīh prior to Mālik ibn 'Anas. He was widely regarded during his generation as the most learned of the ᶜulamā'. He had such extensive knowledge of the legal opinions, rulings, and deeds of ᶜUmar ibn al-Khaṭṭāb that he was called "rāwiyat ᶜUmar" [ᶜUmar's transmitter]; it is said that even ᶜUmar's learned son, ᶜAbd-Allāh ibn ᶜUmar (10bh-73/613-692), would sometimes come to Saᶜīd ibn al-Musayyab to learn information about his father. Saᶜīd was also a genealogist and historian in addition to being a faqīh and muḥaddith. He was one of the Seven Fuqahā' of Madīnah, about whom more will be said later. Sezgin, 1:276; and ᶜAbd-Allāh ibn Ṣāliḥ ar-Rasīnī, "Fiqh al-Fuqahā' as-Sabᶜah wa 'Atharuhū fī Fiqh al-'Imām Mālik" (M.A. thesis, King ᶜAbd-al-ᶜAzīz University, Mecca, Saudi Arabia, 1391-92/1971-72), pp. 45-53.

[2] 'Abū 'l-Walīd Muḥammad ibn 'Aḥmad IBN RUSHD [al-Jadd (the grandfather)] (450-520/1058-1126) was the grandfather of Ibn Rushd [al-Ḥafīd (the grandson)], the philosopher and the author of Bidāyat al-Mujtahid. Ibn Rushd [al-Jadd] died in the same year his grandson was born, and their names are identical. Ibn Rushd [al-Jadd] is a very highly regarded Mālikī legal theorist. He was the qāḍī 'l-jamāᶜah [chief qāḍī] of Cordova. Ziriklī, 6:210.

[3] Muḥammad ibn 'Aḥmad IBN RUSHD [al-Jadd], Al-Muqaddimāt al-Mumahhidāt li-Bayān mā 'qtaḍathū Rusūm al-Mudawwanah min al-'Aḥkām ash-Sharᶜīyāt, 4 vols. (Cairo: al-Maṭbaᶜah al-Khairīyah, 1324/1906), 1:27.

Similarly, there was the prominent Madīnan faqīh, qāḍī, and onetime governor 'Abū Bakr ibn Ḥazm,[1] who had been commissioned by the 'Umayyad caliph ᶜUmar ibn ᶜAbd-al-ᶜAzīz[2] to collect and compile the ḥadīth and sunnah of the Prophet for fear it would be lost with the passing away of the early ᶜulamā'.[3] 'Abū Bakr ibn Ḥazm's son, student, and transmitter, ᶜAbd-Allāh (56 or 60-130/675 or 679-747)--himself a notable muḥaddith and historian like his father--was one of Mālik's teachers.[4]

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[1]'ABŪ BAKR ibn Muḥammad ibn ᶜAmr IBN ḤAZM al-'Anṣārī (d. 120/737) was a great Madīnan faqīh, muḥaddith, and historian. He was first appointed qāḍī of Madīnah in 87/705 during the Madīnan governorship of ᶜUmar ibn ᶜAbd-al-ᶜAzīz. He continued to preside as qāḍī during that governorship and the following of ᶜUthmān ibn Ḥayyān al-Murrī. 'Abū Bakr was then appointed governor of Madīnah upon the ouster of al-Murrī. When ᶜUmar ibn ᶜAbd-al-ᶜAzīz became caliph he commissioned 'Abū Bakr with the project mentioned above, but ᶜUmar did not live long enough to see the results. 'Abū Bakr ibn Ḥazm died in Madīnah around the age of eighty-four. Mālik would have been something like in his late twenties at that time. Sezgin, 1:56-57, 284; Abbott, 2:25-26; and WAKIᶜ Muḥammad ibn Khalaf aḍ-Ḍabbī, 'Akhbār al-Quḍāt, ed. ᶜAbd-al-ᶜAzīz Muṣṭafā al-Murāghī, 3 vols. (Cairo: al-Maktabah at-Tijārīyah al-Kubrā, 1366/1947), 1:133-148.

WAKIᶜ (d. 306/918) was a qāḍī of 'Ahwāz in Persia. He was a faqih, historian, grammarian, and poet. He died in Baghdad. His history of judges, mentioned above, is an immensely valuable historical source. Sezgin, 1:376.

[2]ᶜUMAR IBN ᶜABD-AL-ᶜAZĪZ ibn Marwān ibn al-Ḥakam (61-101/681-720) is sometimes called the "fifth rightly guided caliph", because of his great piety and justice. He was born and grew up in Madīnah. He later became its governor for some years. He became the 'Umayyad caliph in 99/718 but only briefly before his death two and a half years later. Ziriklī, 5: 209.

[3]Sezgin, 1:56-57; Abbott, 2:25-26.

[4]Sezgin, 1:284.

But the most knowledgeable of the prominent Madīnan ᶜulamā' in the ḥadīth of the non-Madīnans is likely to have been Ibn Shihāb az-Zuhrī, one of Mālik's primary teachers. With 'Umayyad financial support, az-Zuhrī continued the project of 'Abū Bakr ibn Ḥazm for over twenty-five years after the death of ᶜUmar ibn ᶜAbd-al-ᶜAzīz. According to Abbott, ᶜUmar had intended initially to collect and classify those ḥadīth that pertained to Islamic law. Under az-Zuhrī, however, the project expanded until it came to include the collection of all Prophetic ḥadīth in general. Az-Zuhrī's influence upon his contemporaries, furthermore, was so great that Abbott refers to the last years of the first/seventh century and the first decades of the second/eighth as the "age of Zuhrī". Because of az-Zuhrī's persistent use of writing in transmitting the ḥadīth he collected, his age became the age of manuscripts, and the methods of written transmission of ḥadīth, which according to Abbott, Sezgin, and Azmī had been used since the times of the Prophet, had clearly won out within decades of az-Zuhrī's death over purely oral methods of transmission.[1]

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[1]Abbott, 2:25-26, 30-35, 52-53; Sezgin, 1:53-57, 60-61; Azmi, pp. 1-5, 28-106, 211, 231.

Sezgin holds that the names referred to in 'isnād's refer to the manuscripts that each of those muḥaddith's named in the 'isnād possessed. (Azmi agrees with this; cf. Azmi, p. 299.) Sezgin has devised an interesting method of analyzing the content of 'isnād's so as to restore lost books. He has applied this method to the works of al-Bukhārī, Muslim, and aṭ-Ṭabarī. See Sezgin, 1:82-83, 115-116, 136, 323-325, 378-379.

Madīnah and the cultures of the outside world. It would be mistaken, therefore, to conceive of Mālik's Madīnah as a sleepy, far-away desert town, cut off from and unconcerned with the world beyond it. Madīnah had other attractions in addition to its ᶜulamā'. It had about it the aura of Islam's earliest days, Islam's golden age as it were. It contained relics of the Prophet and his Companions. It was the site of his mosque, the place of his burial. Madīnah contained many of the houses and graves of the Companions as well. Such attractions would probably have been sufficient to keep Muslims, learned and unlearned, coming to Madīnah from all parts of the world of Islam. But in addition to these incentives, the Prophet had declared Madīnah a sacred city and sanctuary [ḥaram], like Makkah and Jerusalem, and had encouraged Muslims to exert themselves to visit it.[1] Finally, for many of those who came from the north, west, and east annually to perform the religious duty of pilgrimage to Makkah, Madīnah was directly on their route of travel. No doubt, many of those who came to Makkah by other routes would have visited Madīnah before or after their pilgrimage, as is the custom today.

Each year brought new visitors to Madīnah from all parts of the Muslim world. These visitors must have kept

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[1]For ḥadīth pertaining to Madīnah's special religious status and its blessings, see Muwaṭṭa', 2:885-890.

many Madīnans in touch with the outside world, its customs, peoples, languages, and problems. It is reported that when Mālik's fame had spread and the number of those visiting him became too great, Mālik would have his gate-keeper call out into the crowd beckoning first the people of the Ḥijāz to enter. Thereafter, he would call for the Syrians and, after their session, for the peoples of Iraq, North Africa, and so forth.[1] 'Abū Zahrah suggests that because Mālik was exposed constantly to the numerous legal problems of great diversity that his visitors brought him, it was not necessary for his school to elaborate its legal doctrine by hypothetical reasoning, as was the case in Kūfah. He holds, furthermore, that because Mālik's fiqh was being constantly elaborated with reference to concrete problems, it remained very practical, always taking into careful consideration the maṣlaḥah [personal or social benefit] behind its rulings.[2] It might also be pointed out that, by calling the peoples of separate regions to visit with him in private sessions, Mālik would have been able to develop an awareness of the special problems and characteristics of each region. It would also appear likely that Mālik would have come to know the legal opinions of the leading fuqahā' in those regions.[3]

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[1]ʿIyāḍ, cited by 'Abū Zahrah, p. 57 [2]Ibid., pp. 18-19.

[3]There are reports that 'Abū Ḥanīfah met Mālik and discussed matters of law with him; they seem likely in view of reports that 'Abū Ḥanīfah performed the pilgrimage to Makkah fifty-five times. It is reported that 'Abū Yūsuf

There are examples of legal questions in the Mudawwanah that reflect the cosmopolitan diversity of some of the questions Mālik would be asked. A party states to him, for instance, that they must often travel through the ice, snow, rain, and cold of regions that provide them no shelter by night but churches. They want to know if it is permissible for them to stay in those churches under such conditions.[1] Mālik talks about Berber merchants who trade with the Spaniards [al-'Ashbānīyīn], Berber merchants who know how to write the Nubian script, and Sicilian merchants who trade with the Nubians.[2] It is reported that Mālik had written a certain response to the qāḍī of al-Qairawān in Tunisia on a complicated question of inheritance; apparently Mālik had been written about the question.[3] The question is asked about the legitimacy of certain rulings made by the governor [wālī] of Alexandria and his qāḍī, whom he has asked to give a certain ruling. It is mentioned that

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desired to debate Mālik before the ᶜAbbāsid caliph, but Mālik refused, stating that ᶜulamā' are not gamecocks to be spurred on against each other. I have mentioned that ash-Shaibānī studied under Mālik. Reports have it that 'Abū Ḥanīfah's son Ḥammād came once to visit Mālik and had a private session with him. First Mālik let Ḥammād ask him whatever questions he wanted. Then Mālik began asking Ḥammād what positions 'Abū Ḥanīfah had taken on certain matters and what his reasoning [ḥujjah] had been. See Muḥammad Zāhid al-Kawtharī, Fiqh 'Ahl al-ᶜIrāq wa Ḥadīthuhum, ed. ᶜAbd-al-Fattāḥ 'Abū Ghuddah (Beirut: Maktabat al-Maṭbūᶜāt al-'Islāmīyah, 1390/1970), pp. 51-52; and ᶜIyāḍ, 1:164.

[1]Mudawwanah, 1:90 (11). [2]Ibid., 3:118 (25).

[3]Ibid., 3:86 (18).

Mālik had stated his opinion about the governors of the seaports [wulāt al-miyāh] on other occasions as well as his opinion about the governor of al-Fusṭāṭ [Old Cairo].[1]

Mālik is asked whether the inhabitants of coastal areas when in danger of attack by sea should perform the "prayer of fear" [ṣalāt al-khawf]--a special way of praying during times of immediate danger to avoid being taken by surprise while praying--in the shortened manner, as do those who are threatened by attack on land. Mālik replies that when there is danger of attack by sea the prayer is not shortened. They should pray the prayer fully, after the manner of the inhabitants of Alexandria, ᶜAsqalān (in Palestine), and Tūnis.[2] Finally, Mālik is asked, in connection with mines that had been discovered in Northwest Africa ['arḍ al-maghrib], whether they could be inherited as private property. Mālik replies that they cannot be inherited privately and are the property of the state.[3]

Mālik's main teachers

Mālik spent anywhere from seven to sixteen years of his childhood and early youth under the special tutorship of ᶜAbd-ar-Raḥmān ibn Hurmuz (d. 117/735), a reliable Madīnan muḥaddith of Persian extraction who had extensive knowledge of ḥadīth--many of which he had learned from prom-

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[1]Mudawwanah, 4:77 (12). [2]Ibid., 1:149 (21).

[3]Ibid., 3:216 (1).

inent Companions.[1] It is noteworthy that Ibn Hurmuz is reported to have been one of the teachers of Mālik's main teachers: az-Zuhrī, Yaḥyā ibn Sa^cīd, Rabī^cat ar-Ra'y, and 'Abū 'z-Zinād ibn Dhakwān, all of whom transmit ḥadīth from him.[2] Mālik, however, did not transmit ḥadīth in Ibn Hur-

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[1]^cAbd-ar-Raḥmān IBN HURMUZ is also known as "al-'A^craj" [the lame]; it is reported that he died in Alexandria. One report has it that he died in 110/728, but Ibn Ḥajar regards it as spurious. Note that Mālik is not mentioned in Ibn Ḥajar's biographical account of Ibn Hurmuz; I believe this is because Mālik never transmits ḥadīth in Ibn Hurmuz's name and those who are mentioned in such biographical accounts are those who either transmitted ḥadīth from the person in question or from whom he transmitted. See Ibn Ḥajar, 6:290-291.

There was another Successor in Madīnah known as "Ibn Hurmuz", namely, Yazīd ibn Hurmuz, also known as "Yazīd al-Fārisī" [Yazīd the Persian]. He was a highly regarded muḥaddith and one of az-Zuhrī's teachers. I have ruled him out, however, as having been Mālik's Ibn Hurmuz, because it is reported that this Ibn Hurmuz was killed in 63/682 during the Battle of al-Ḥarrah outside Madīnah. (Ibn Hurmuz had been the leader of the mawālī contingent during the battle.) But another report has it that this Ibn Hurmuz died during the caliphate of ^cUmar ibn ^cAbd-al-^cAzīz. Even if that were so, Mālik would have been only a boy of ten or less at Ibn Hurmuz's death. See Ibn Ḥajar, 11:369-370.

Regarding Mālik's study under Ibn Hurmuz, see ^cIyāḍ, 1:116 and Ibn Farḥūn, cited by 'Abū Zahrah, pp. 32-33, 107 notes 1 and 2.

[2]YAḤYĀ IBN SA^cĪD ibn Qais al-'Anṣārī (d. 143/760) was a prominent Madīnan Successor who transmitted ḥadīth from some of the Companions and from older Successors. He was one of Mālik's main teachers but was also the teacher of Sufyān ath-Thawrī, al-'Awzā^cī, and the famous and highly significant Baṣran muḥaddith Shu^cbah ibn al-Ḥajjāj (82-160/701-776). Az-Zuhrī and Rabī^cah also transmitted ḥadīth from him. According to Sufyān ath-Thawrī, the people of Madīnah held Yaḥyā ibn Sa^cīd in even higher esteem than they held az-Zuhrī. Yaḥyā was the qāḍī of Madīnah during the caliphate of the 'Umayyad al-Walīd ibn ^cAbd-al-Malik (86-96/705-715); during the caliphate of the ^cAbbāsid al-Manṣūr, Yaḥyā was appointed qāḍī of al-Hāshimīyah in Iraq. He died in Baṣrah. Sezgin, 1:407.

muz's name, which Ibn Hurmuz is reported to have required of Mālik under oath.[1]

We do not know Ibn Hurmuz's date of birth. It is likely, however, that he was a generation older than his students az-Zuhrī, Rabīᶜah, Yaḥyā ibn Saᶜīd, and 'Abū 'z-Zinād, who were roughly of the same generation with each other and would probably have been in the neighborhood of from thirty to forty years Mālik's senior or more. It is likely that ᶜAbd-ar-Raḥmān ibn Hurmuz was advanced in age during the years when the youthful Mālik would come to him for tutorship. Perhaps, Ibn Hurmuz had given up formal teaching at that time and instructed Mālik directly and informally.[2] It may be for that reason that he did not want Mālik to transmit his materials formally. It is an inter-

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RABĪᶜAH ibn 'Abī ᶜAbd-ar-Raḥmān Farrūkh (d. 136/753) was born in Madīnah and was a highly regarded muḥaddith, transmitting from some Companions and from older Successors. He was known for his use of ra'y [personal reasoning] in legal matters and was called by the name, "Rabīᶜat ar-Ra'y" [Rabīᶜah, who is given to using ra'y]. Mālik was a student of his, and Rabīᶜah had his own circle of students around him in Madīnah during his lifetime. He died in Iraq. Sezgin, 1:406; see ᶜIyāḍ, 1:119-120.

'ABŪ 'Z-ZINĀD ᶜAbd-Allāh IBN DHAKWĀN (65-131/684-748) was a Successor and prominent Madīnan faqīh; some of the ᶜulamā' of Madīnah regarded him more highly than Rabīᶜah. 'Abū 'z-Zinād compiled a book of legal opinions of the Seven Fuqahā' of Madīnah, under whom he studied and about whom more will be said later. Sezgin, 1:405.

[1] 'Abū Zahrah, p. 33.

[2] ᶜIyāḍ, 1:158 cites a report according to which Mālik states explicitly that the formal method of transmitting ḥadīth in Madīnah ever since the time of Saᶜīd ibn al-Musayyab and the Seven Fuqahā' and others of their generation had

esting coincidence that Mālik began his education with several years of private tutorship under one who had been an instructor a generation earlier of those Madīnans who would become Mālik's major teachers.

Ibn Hurmuz is reported to have had extensive knowledge of Arabic and the genealogy of the Arabs.[1] Of greater importance than this to Mālik's intellectual formation, however, is the fact that Ibn Hurmuz is reported as having been among the most knowledgeable of people in knowing how to refute "'ahl al-'ahwā' [the followers of sectarian heresies] and those matters about which the people differed."[2] The meaning of 'ahl al-'ahwā' is unambiguous; as for the mean-

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been that the muḥaddith have a reader dictate from his books to the students while the muḥaddith would listen to the dictation, correcting any mistakes the reader made from memory. (This method is called "ᶜarḍ" or, less commonly, "qirā'ah" in the terminology of ḥadīth sciences; cf. Sezgin, 1:59.) Mālik continues to say that Ibn Hurmuz [italics mine], Rabīᶜah, az-Zuhrī, and other Madīnans received and transmitted their knowledge exclusively by this method. In keeping with that tradition, Mālik refuses to dictate from his works directly, even if it be at the personal request of the ᶜAbbāsid caliph, who--in this instance--had asked him to do so in a private session.

Elsewhere, Mālik is reported as having referred to this method as "ᶜarḍ" and as having said that he regards it as superior to "samāᶜ", the method whereby the muḥaddith dictates to his students himself; ᶜIyāḍ, 1:163; cf. Sezgin, 1:59. One of Mālik's students reports that he studied under Mālik for nineteen years; never during that time did he see Mālik dictate the Muwaṭṭa' to his students himself. Rather he always transmitted it by having someone dictate it to them, while Mālik listened on. ᶜIyāḍ, 1:162.

[1]Ibn Ḥajar, 6:290-291. [2]ᶜIyāḍ, cited by 'Abū Zahrah, p. 34.

ing of "those matters concerning which the people differed", it too would refer to differences on theological matters. For, as Madelung has pointed out, references to "ikhtilāf" [differences of opinion] in the early period generally refer in such contexts to the theological differences of the heretical sects.[1] Thus, if this report about Ibn Hurmuz is accurate, Mālik would likely have had the opportunity to become familiar through the medium of Ibn Hurmuz's tutorship with the most important theological and sectarian debates of his age.

With the exception of Ibn Hurmuz and Nāfi^{c},[2] the mawlā of ^{c}Abd-Allāh ibn ^{c}Umar,[3] Mālik's major teachers were the

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[1]Madelung, p. 241.

[2]Abū ^{c}Abd-Allāh NĀFI^{c} mawlā ^{c}Abd-Allāh ibn ^{c}Umar (d. 117/735) was an older Successor. He had extensive knowledge of fiqh and was regarded as among the most excellent of all muḥaddith's. It is related, for example, that Nāfi^{c} never made a single error, however small, in transmitting all that he transmitted. Hence, the 'isnād--Mālik from Nāfi^{c} from ^{c}Abd-Allāh ibn ^{c}Umar--is regarded as the "golden chain" of transmitters. Nāfi^{c} was a Persian child, born in Dailam. He was taken captive during the conquest of that region and became the slave of Ibn ^{c}Umar, who raised him in Madīnah from a small child and gave him his education personally. He later set Nāfi^{c} free. As a muḥaddith, Nāfi^{c} was known as a perfectionist who was harsh and demanding on his students, so much so in fact that many of them found it unpleasant to be around him. Mālik had a great liking for him, however. When Nāfi^{c} became blind toward the end of his life, it is said Mālik would fetch him at his house and bring him to the mosque to teach. During the caliphate of ^{c}Umar ibn ^{c}Abd-al-^{c}Azīz, Nāfi^{c} was sent to Egypt to teach the sunan [pl. of sunnah] to the people. See Ziriklī, 8:319.

[3]^{c}ABD-ALLĀH IBN ^{c}UMAR ibn al-Khaṭṭāb (10bh-73/613-692), like his father, the second caliph, ^{c}Umar ibn al-Khaṭṭāb, was a Companion highly regarded for his intelligence,

younger Successors az-Zuhrī, Rabī^{c}ah, Yaḥyā ibn Sa^{c}īd, and 'Abū 'z-Zinād ibn Dhakwān, to whom I have referred already.[1] The lives of these younger Successors spanned roughly the period between 70/689 and 135/752, and they flourished toward the close of the first/seventh century and during the first three decades of the second/eighth. Although they had received some of their learning from Companions, these younger Successors had received most of it from older Successors.[2]

Ibn Hurmuz was one of these older Successors from whom they received their learning. More important than this, however, they had been students of the Seven Fuqahā'[3] of

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knowledge, and close adherence to Islam. It was said, however, that, although ^{c}Umar ibn al-Khaṭṭāb and his son ^{c}Abd-Allāh were comparable, the circumstances in which they lived differed considerably. For ^{c}Umar had lived at a time when there were those around him who were similar to him, while ^{c}Abd-Allāh ibn ^{c}Umar lived during the last of his life in a generation when there was no longer anyone living comparable to him. Ibn ^{c}Umar gave fatwā's in Madīnah, it is reported, for sixty years. After his father, he is probably the second most authoritative faqīh in the Muwaṭṭa'. He was blind during the last years of his life. Ziriklī, 4:246.

[1]See ^{c}Iyāḍ, 1:119-120; 'Abū Zahrah, pp. 106-112; Nūr-Saif, pp. 16-22; and Sezgin, 1:457.
For data on these persons, see below, pp. 55, n. 4; 63-64, n. 2; 63, n. 2; 63-64, n. 2.

[2]Cf. Nūr-Saif, p. 16.

[3]The Seven Fuqahā' of Madīnah [al-fuqahā' as-sab^{c}ah]--actually, their numbers varied between seven and twelve--comprised a counsel of older Successors in Madīnah for finding solutions to legal questions. Those most commonly cited as making up the Seven Fuqahā' are:
(1) Sa^{c}īd ibn al-Musayyab, see p. 56, n. 1, above.
(2) AL-QĀSIM IBN MUḤAMMAD ibn 'Abī Bakr (d. ca 106/

Madīnah, who were comprised of some of the most renowned and highly respected older Successors of the Islamic world, namely, Sa^{c}īd ibn al-Musayyab, al-Qāsim ibn Muḥammad, Sulaimān ibn Yasār, ^{c}Urwah ibn az-Zubair, and Khārijah ibn Zaid. Thus, Mālik was connected with the tradition of the Seven Fuqahā' through his major teachers. He refers to the ḥadīth, āthār, and legal opinions of Sa^{c}īd ibn al-Musayyab, al-Qāsim ibn Muḥammad, Sulaimān ibn Yasār, ^{c}Urwah, and Khārijah throughout the Muwaṭṭa'; undoubtedly, Mālik regarded them as a central part of the Madīnan legal tradition.

Mālik's teacher 'Abū 'z-Zinād ibn Dhakwān compiled a book of important legal opinions of the Seven Fuqahā' upon

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ca. 724). He was the grandson of the first caliph, 'Abū Bakr, on his father's side and is said to have been the grandson of Yazdagird, the last Persian emperor, on his mother's side, since Muḥammad ibn 'Abī Bakr, his father, is reported to have taken Yazdagird's daughter as a wife. Al-Qāsim ibn Muḥammad was also a nephew of the Prophet's wife ^{c}Ā'ishah, daughter of 'Abū Bakr. Al-Qāsim was close to her and is reported to have received much of his learning from her. He was one of ^{c}Umar ibn ^{c}Abd-al-^{c}Azīz's teachers.

(3) ^{c}URWAH IBN AZ-ZUBAIR ibn al-^{c}Awwām (ca. 25-94/ca. 645-712). He was about thirty years younger than his brother ^{c}Abd-Allāh ibn az-Zubair; he was a great-nephew of the Prophet's wife Khadījah and a grandson of 'Abū Bakr on his mother's side, 'Asmā' bint 'Abī Bakr. He learned much from his aunt, ^{c}Ā'ishah.

(4) SULAIMAN IBN YASAR (d. 100/718). He was a mawlā of the Prophet's wife Maimūnah and took much of his learning from ^{c}Ā'ishah. Sulaimān was highly regarded by virtue of the excellence of his mind and high quality of his learning.

(5) KHĀRIJAH IBN ZAID ibn Thābit (30-100/650-718). He was the son of the Companion Zaid ibn Thābit, one of the most knowledgeable and highly regarded of the Companions. ^{c}Iyāḍ, 1:87, says Zaid was regarded as the most knowledgeable of them.

(6) ^{c}UBAID-ALLĀH IBN ^{c}ABD-ALLĀH ibn ^{c}Utbah (d. 98/716).

(7) 'ABŪ BAKR IBN ^{c}ABD-AR-RAḤMĀN ibn al-Ḥārith (d. 94/712). See ar-Rasīnī, pp. 27-67; and Sezgin, 1:279,278.

[1]Ar-Rasīnī, pp. 27-67, 100-102.

which they had reached consensus. Ibn an-Nadīm[1] mentions this work in his Fihrist [index of books]; the work has now been lost, but the Mudawwanah and various ḥadīth books contain numerous citations from it.[2]

Ar-Rasīnī has collected and analyzed citations in the Mudawwanah and other sources from Ibn Dhakwān's book on the Seven Fuqahā'. He concludes that Mālik agrees with their consensus over ninety percent of the time; he concludes, furthermore, that there must have been a strong continuity between the fiqh of the Seven Fuqahā' and that of Mālik, by virtue of the consistency with which he agrees with them.[3] I agree with ar-Rasīnī's second conclusion but disagree with the first. It appears to me that ar-Rasīnī's analysis of the opinions of the Seven Fuqahā' and his comparisons between them and the opinions of Mālik are not always accurate. Oc-

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[1]'Abū 'l-Faraj Muḥammad ibn 'Isḥāq, known as "IBN AN-NADĪM" or "AN-NADĪM," (d. 380/990) was a Baghdadi book dealer [warrāq] during the fourth/tenth century. He was of considerable importance and social standing. Probably, both his father and he were court companions of the ᶜAbbāsids, hence the name "an-nadīm" [court companion]. Ibn Ḥajar says he was a shīᶜī, which Dodge believes to be confirmed by the text of Ibn an-Nadīm's Fihrist. Ibn Ḥajar also regards him as having been a muᶜtazilī. His index of books, al-Fihrist, is a bibliography of the available books Ibn an-Nadīm knew of and contains extensive discussions by Ibn an-Nadīm as well. It is an immensely valuable historical source. See The Fihrist of al-Nadīm: A Tenth Century Survey of Muslim Culture, ed. and trans. Bayard Dodge, 2 vols. (New York: Columbia University Press, 1970), 1:xv-xxiii.

[2]Ar-Rasīnī, pp. 100-102. [3]Ibid., Preface.

casionally, he regards non-essential differences in wording and details to be differences of opinion.[1] There are instances when ar-Rasīnī cites statements from the Seven Fuqahā' in which they set forth a general rule of law; he then regards specific exceptions to or elaborations on that general rule to be differences of opinion.[2] I do not regard

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[1]For example, in the case of a man who has been found guilty of illicit sexual relations shortly after having gotten married, ar-Rasīnī, p. 186, holds that Mālik disagrees with the Seven Fuqahā' as to what shall be regarded as constituting proof that the man's marriage had been consumated prior to the act of illicit sex, such that he would be guilty of adultery and not fornication. The opinion of the Seven Fuqahā' is that "ad-dukhūl" [lit., "entering"] consumates the marriage. Mālik holds that "waṭ'" [intercourse] consumates the marriage. Ar-Rasīnī is mistaken in regarding this difference in vocabulary as a difference in opinion, since "ad-dukhūl" and "al-waṭ'" refer to the same thing.

[2]For example, ar-Rasīnī, p. 415, cites a report in which al-Qāsim ibn Muḥammad states the general rule of law that the testimony of youths is not permissible. Ar-Rasīnī concludes on this basis that al-Qāsim ibn Muḥammad would have disagreed with the point of law that Mālik sets forth in the Muwaṭṭa' as an AMN, namely, that the testimony of youths who have not attained puberty will be permissible in the case when they inflict wounds upon each other by fighting among themselves, if their testimony is properly recorded immediately after the fighting and before the boys have dispersed or been able to speak with any adults.

I believe that ar-Rasīnī has insufficient evidence to conclude that there is a difference of opinion here. For Mālik subscribes to the same general rule as al-Qāsim. He states immediately after this special precept that the testimony of youths is not permissible in any but this special case; Muwaṭṭa', 2:726. I believe Mālik's opinion, which he claims to be supported by the Madīnan fuqahā', is an example of al-maṣāliḥ al-mursalah, one of the chief characteristics of which is to draw exceptions like these to general rules without regarding the general rules thereby to be invalid.

To further illustrate my point, if one person is quoted as saying that it is impermissible to run red lights, one cannot conclude on that basis that that person disagrees with the special provision that ambulances and other emergency

such examples to be well-established cases of differences of opinion between Mālik and the Seven Fuqahā', especially in light of the consideration that a chief feature of Mālik's application of the principles of istiḥsān, sadd adh-dharā'i^{c}, and al-maṣāliḥ al-mursalah[1] is that of elaborating upon or drawing exceptions in special cases to general rules, which are regarded as valid nevertheless. Thus, my interpretation of the data in ar-Rasīnī's thesis would be that the degree of conformity between Mālik's opinions and those of the Seven Fuqahā' is higher than he has concluded.

Thus, Mālik had direct access through his major teachers to the Seven Fuqahā' and a central tradition of the Madīnan school of law; it appears on the basis of ar-Rasīnī's evidence, furthermore, that there was considerable continuity between the fiqh of the Seven Fuqahā' and that of Mālik. And, through his teacher az-Zuhrī, Mālik had access not only to the tradition of the Seven Fuqahā' but also to the ḥadīth of the non-Madīnans. Az-Zuhrī is reported to have compiled extensive volumes of these ḥadīth. (It is reported that az-Zuhrī collected so many books of ḥadīth and spent so much time with them, that his wife used to complain:

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vehicles should be permitted to run red lights.

For other instances of possible inaccuracies of this nature, see ar-Rasīnī, pp. 153, 157, 159, 168, 183, 215, 218, 240, 266, 271, 316.

[1]For definitions and illustrations of these concepts, see below, pp. 245-280.

"I swear by God that these books are harder for me to bear than three co-wives."[1]) It is reported that Mālik possessed chests filled with extensive notebooks of the ḥadīth he had collected from az-Zuhrī. He refused to transmit most of these ḥadīth, however, which I will come back to later when discussing Mālik's attitude toward ḥadīth.[2]

Mālik's standards in selecting teachers

It is reported that Mālik took great pride in the fact that he had always been very selective in choosing his teachers. He held that he had only sat with the best and the most highly qualified; he also is reported to have said that he took his ḥadīth only from fuqahā'. Furthermore, Mālik is reported to have said that he had always taken care to receive his learning only under conditions well-suited for learning. It was his habit, for example, never to receive instruction while standing in a crowd of other students.[3]

Ibn ᶜAbd-al-Barr[4] reports that Mālik taught that

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[1] 'Aḥmad ibn Muḥammad IBN KHALLIKĀN, Wafayāt al-'Aᶜyān (Cairo: n.p., 1310/1892), 1:451; and 'Ismāᶜīl 'ABU 'L-FIDA', Al-Mukhtaṣar fī 'Akhbār al-Bashar, 4 vols. (Constantinople: n.p., 1286/1869), 1:204 cited by Azmi, p. 280.

[2] ᶜIyāḍ, 1:148, 151. See below, pp.

[3] ᶜIyāḍ, 1:123-125.

[4] 'Abū ᶜUmar Yūsuf ibn ᶜAbd-Allāh IBN ᶜABD-AL-BARR (368-463/978-1071) was one of the most renowned of the Andalusian Mālikī scholars. He was a Cordovan but travelled

there were four categories of people from whom one should not accept ḥadīth: (1) an incompetent [safīh]; (2) a proponent of a heresy or heretical innovation; (3) one who lies when speaking with other people, even though there be no suspicion that he lies when transmitting ḥadīth; and (4) a learned man [shaikh] who is known for his excellence and integrity and his being given to much worship, if he lacks awareness of [the content and nature] of what he receives and transmits ['idhā kāna lā ya^c^rifu mā yaḥmilu wa mā yuḥaddithu bihī].[1]

It is clear from other reports that there were many transmitters of knowledge in Madīnah whom Mālik felt belonged to one of these four categories and from whom he never received or transmitted any knowledge. According to one report, Mālik said:

> During my lifetime I have met a large number [jamā^c^ah] of the people of Madīnah from whom I never took a single piece of learning, even though they were people from whom knowledge was being taken. And they were of

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widely. He was qāḍī of Lisbon for a time. Ibn ^c^Abd-al-Barr was especially renowned for his extensive knowledge of ḥadīth; he was considered one of the most accomplished ḥafiẓ's [one who commits thousands of ḥadīth to memory along with their 'isnād's] and was called "ḥāfiẓ al-maghrib" [the ḥāfiẓ of the West]. He was also a great faqīh and did extensive research into the opinions of the fuqahā' of different schools. He was also a historian and man of letters; Zirikli, 9:316-317; Kaḥḥālah, 13:315-316.

[1]Yūsuf IBN ^c^ABD-AL-BARR, Al-Intiqā' fī Faḍā'il ath-Thalāthah al-'A'immah al-Fuqahā': Mālik wa 'sh-Shāfi^c^ī wa 'Abī Ḥanīfah raḍiya 'Llāhu ^c^anhum wa Dhikr ^c^Uyūn min 'Akhbārihim wa 'Akhbār 'Aṣḥābihim li-'t-Ta^c^rīf bi-Jalālat 'Aqdārihim (Cairo: Maktabat al-Qudsī, 1350/1931), p. 16.

> different types. There were those among them who would lie when speaking to people, although they would not lie when speaking about matters of learning. There were those among them who were ignorant of [the content and nature] of what they possessed [kāna jāhilan bi-mā ᶜindahū]. And there were those among them who were accused of having unsound opinions [kāna yurmā bi-ra'y sū']. So I left them all alone.[1]

According to another report, Mālik was asked why he did not transmit ḥadīth on the authority of the people of Iraq. He replied that he did not because of his observation that when they came to Madīnah they took ḥadīth from those who are not trustworthy [thiqah].[2]

Other reports have it that Mālik regarded many of those who transmitted ḥadīth in Madīnah to be of the fourth category, namely, the category of those pious learned men of integrity and high standing who are not aware of the content, nature, and--perhaps--source of what they receive and transmit. Ibn Wahb,[3] who was one of Mālik's most important

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[1] ᶜIyāḍ, 1:123; Ibn ᶜAbd-al-Barr, pp. 15-16.

[2] ᶜIyāḍ, 1:150.

[3] ᶜAbd-Allāh IBN WAHB ibn Muslim (125-197/742-812), one of the most significant of Mālik's students, is reported to have studied under Mālik for thirty-one years. He was very effective in spreading the Mālikī school in his native Egypt. It is said that Mālik would refer to him as "faqīh Miṣr" [the faqīh of Egypt]. Ibn Wahb had extensive knowledge of ḥadīth and āthār. It is reported that he collected all the ḥadīth of Egypt and the Ḥijāz. Ibn Wahb had many books, and Ibn al-Qāsim said of him that no one had compiled transmitted knowledge [dawwana 'l-ᶜilm] as had Ibn Wahb. Ibn Wahb was also regarded as one of the most reliable sources from which to learn Mālik's most authentic legal opinions in matters concerning which there were contrary reports. Like numerous students of Mālik, Ibn Wahb transmitted the Muwaṭṭa'; his recension is said to contain more material than the others. Much of the material that Saḥnūn puts in the

students, reports that Mālik told him:

> During my lifetime I have met in this city [of Madīnah] people whose prayers, if ever they were asked to pray for rain, would be answered and who had heard much by way of knowledge [ᶜilm] and ḥadīth. Yet I never transmitted a single ḥadīth from any of them. For they had come to be too much preoccupied with the fear [khawf] of God and asceticism [zuhd].
>
> This business [sha'n], that is, [sic] ḥadīth and the giving of fatwā's, requires men characterized by fear of God [taqī], piety [waraᶜ], cautiousness [ṣiyānah], perfectionism ['itqān], knowledge, and understanding [fahm], in order that they perceive what is coming out of their heads and what the results of it will be tomorrow. But as for those who lack this perfectionism ['itqān] and awareness [maᶜrifah], no benefit can be derived from them. They are not authoritative sources of knowledge [ḥujjah], and one should not take knowledge from them.[1]

According to a similar report attributed to Ibn Wahb and three other prominent students of Mālik, Mālik used to say:

> This knowledge [of ḥadīth, etc.] constitutes [our] religion; so consider carefully those from whom you take it.
>
> During my lifetime I have met among these pillars (and he pointed to the [pillars of] the mosque [of the Prophet]) very many [lit., seventy] of those who say: "the Prophet of God said . . . ," from whom I never took a single bit of learning, despite the fact that there were those among them who, if they had been put in charge of a treasury, would have been found to be completely trustworthy. Nevertheless, they were not worthy of this business [of transmitting knowledge].[2]

The standards that Mālik set for himself in selecting those from whom he received his learning obviously have bearing on Mālik's concept of who should constitute Madīnan 'ijmāᶜ. It is not likely that he would have regarded the opinions

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Mudawwanah comes from Ibn Wahb. See Ibn Ḥajar, 6:71-74; Sezgin, 1:466.

[1]ᶜIyāḍ, 1:123. [2]Ibid.; and Ibn ᶜAbd-al-Barr, p. 16.

of those Madīnan scholars and transmitters of knowledge to be worthy of consideration in questions of 'ijmāᶜ who--according to his description--were so deficient in perfectionism and awareness that they could not "perceive what is coming out of their heads and what the results of it will be tomorrow" and from whom "no benefit can be derived".

Mālik's Attitude toward Ḥadīth

Mālik received from his teachers an extensive knowledge of ḥadīth, by virtue of which Mālik was highly regarded as a muḥaddith. Al-Bukhārī[1] and Muslim[2] held Mālik in high regard as reflected by the heavy reliance of their ḥadīth compilations on Mālik's Muwaṭṭa'.[3] Later muḥaddith's conferred upon Mālik the honorary title of "amīr al-mu'mi-

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[1]Muḥammad ibn 'Ismāᶜīl AL-BUKHĀRĪ (194-256/810-876) was a famous muḥaddith from Bukhārā in Central Asia. His compilation of ḥadīth, Ṣaḥīḥ al-Bukhārī, is regarded among sunnī Muslims as a completely authentic compilation. Sezgin, through his analysis of the 'isnād's of al-Bukhārī's work, has indicated that al-Bukhārī relied heavily upon written materials--such as the Muwaṭṭa'. In addition to fiqh and ḥadīth works, al-Bukhārī took materials from philological and historical works. See Sezgin, 1:115-116.

[2]MUSLIM ibn al-Ḥajjāj al-Qushairī (ca. 204-261/ca. 819-875) was a famous muḥaddith of Nīsāpūr and a student of al-Bukhārī. His compilation of ḥadīth, Ṣaḥīḥ Muslim, is regarded to be as highly authentic as al-Bukhārī's. Sezgin has shown that Muslim too relied heavily upon written materials. Many Muslims have regarded Ṣaḥīḥ Muslim to be better organized than al-Bukhārī's work. See ibid, 1:136.

[3]ᶜAbd-al-Bāqī's edition of the Muwaṭṭa' indicates after each ḥadīth whether or not it has been transmitted by the same 'isnād in al-Bukhārī and Muslim. Most of the ḥadīth in the Muwaṭṭa' are contained in one of these two works and generally in both.

nīn fī 'l-ḥadīth" [commander of the believers in ḥadīth], which is given to those muḥaddith's who had committed extensive amounts of ḥadīth to memory and understood their contents well, such that they were the intellectual and spiritual leaders ['aᶜlām wa 'a'immah] of their generations. Later muḥaddith's also applied this title to Mālik's teacher 'Abū 'z-Zinād ibn Dhakwān, the Kūfan muḥaddith Sufyān ath-Thawrī,[1] the Baṣran Shuᶜbah ibn al-Ḥajjāj,[2] and al-Bukhārī.[3] ᶜAbd-ar-Raḥmān ibn Mahdī,[4] a student of Mālik and a

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[1]SUFYĀN ibn Saᶜīd ATH-THAWRĪ (ca. 96-161/ca. 714-778) was an outstanding Kūfan muḥaddith and is regarded as having been the first in Kūfah to organize the compilation of ḥadīth systematically according to subject matter. He was of 'ahl al-ḥadīth [the proponents of ḥadīth] and is said to have been good at mathematics. Sezgin, 1:518.

[2]SHUᶜBAH IBN AL-ḤAJJĀJ ibn al-Ward al-'Azdī (82-160/701-776) was born in Wāsiṭ but later went to Baṣrah, where he lived until his death. Like Sufyān ath-Thawrī in Kūfah, Shuᶜbah was among the first in Baṣrah to organize the compilation of ḥadīth systematically according to subject matter. Shuᶜbah is known especially, however, as having been the first to treat the biographical study of the lives of the muḥaddith's as an independent field of study; later it would develop into ᶜilm ar-rijāl [the biographical sciences of ḥadīth]. Shᶜbah was also known for his extensive knowledge of poetry. Ibid., 1:92.

[3]Muḥammad ᶜAjjāj al-Khaṭīb, 'Uṣūl al-Ḥadīth: ᶜUlūmuhū wa Muṣṭalaḥuhū (Beirut: Dār al-Fikr al-Ḥadīth, 1386/1967), pp. 446-447.

[4]ᶜAbd-ar-Raḥmān IBN MAHDĪ ibn Ḥassān AL-LU'LU'Ī (135-198/752-814) was a great ḥāfiẓ of ḥadīth and was born and died in Baṣrah. He studied under Mālik, Shuᶜbah, Sufyān ath-Thawrī, and Sufyān ibn ᶜUyainah (107-196/725-811), the renowned Makkan muḥaddith. Ibn Mahdī dictated many systematically arranged compilations of ḥadīth [taṣānīf] while in Baghdad. The muḥaddith Yaḥyā ibn Maᶜīn (158-233/775-847) says that Ibn Mahdī followed some [sic] of the schools of 'ahl al-ḥadīth and that he inclined toward the ra'y of Ma-

very influential muḥaddith in his generation, is reported to have said that the 'imām's [religious leaders] in ḥadīth whose examples one ought to follow were four: (1) Sufyān ath-Thawrī in Kūfah, (2) Mālik ibn 'Anas in the Ḥijāz, (3) al-'Awzāᶜī[1] in Syria, and (4) Ḥammād ibn Zaid[2] in Baṣrah.[3]

According to another report, Ibn Mahdī held that Mālik had committed more knowledge of ḥadīth to memory than any other in his generation [i.e. he was "'aḥfaẓ"]; he held that Mālik did not err in ḥadīth and that there was none on

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dīnah. Ash-Shāfiᶜī held Ibn Mahdī in especially high regard and is reported to have said of him that he did not know the likes of Ibn Mahdī in the whole world. It is also noteworthy that ash-Shāfiᶜī is reported to have compiled his Risālah at the personal request of ᶜAbd-ar-Raḥmān ibn Mahdī. See Ziriklī, 4:115; Ibn Ḥajar, 6:279-281; Sezgin, 1:488.

[1]ᶜAbd-ar-Raḥmān ibn ᶜAmr AL-'AWZĀᶜĪ (88-157/707-774) was one of the most prominent fuqahā' of Mālik's generation; he lived in Damascus and Beirut and studied from az-Zuhrī, ᶜAṭā' ibn 'Abī Rabāḥ (27-114/647-732), the so-called "muftī of Makkah", and Qatādah (60-118/679-736)--the renowned faqīh, Qur'ānic commentator, genealogist, and scholar of the history and poetry of the pre-Islamic Arabs. Al-'Awzāᶜī was among the first to compile books of sunan organized according to chapter. Many ᶜulamā' regarded him more highly than Sufyān ath-Thawrī. Sezgin, 1:516.

[2]ḤAMMĀD IBN ZAID ibn Dirham (98-179/717-795), known as "al-'Azraq" [the blue-eyed], was a Baṣran mawlā whose background was from Sijistān in Persia. He had extensive knowledge of ḥadīth and was widely regarded as the "shaikh of Iraq" in his generation. The ḥadīth of Ḥammād ibn Zaid are transmitted in all the six major sunnī compilations of ḥadīth. He was renowned for his memory, as were many of the muḥaddith's; he became blind. Ziriklī, 2:301.

[3]ᶜIyāḍ, 1:132.

the face of the earth more to be trusted in the matter of the ḥadīth of the Prophet than Mālik. In another report, Ibn Mahdī states that he had never known anyone quite like Mālik and Ḥammād ibn Zaid, for both of them--he believed--had exercised a caution with regard to transmitting ḥadīth that indicated that they anticipated only the reward of God in their teaching of ḥadīth [kānā yaḥtasibāni fī 'l-ḥadīth],[1] the implication being--I believe--that it was not their intent in teaching to win the acclaim of others. For, as will be seen in the case of Mālik, he refused to transmit most of the ḥadīth he knew, because he regarded them as defective and misleading.

Finally, in a third statement attributed to Ibn Mahdī, he remarks that Sufyān ath-Thawrī was an 'imām in ḥadīth but not in the sunnah; al-'Awzā^{c}ī was an 'imām in the sunnah but not in ḥadīth; as for Mālik, however, Ibn Mahdī holds that he was an 'imām in both ḥadīth and sunnah.[2] In this report ḥadīth and sunnah are clearly conceived of as two quite different things. Reports pertaining to Mālik's attitude toward ḥadīth and analysis of Mālik's conception and application of the concept of Madīnan ^{c}amal as well as Mālik's legal theory in general affirm that Mālik also conceived of ḥadīth and sunnah as distinct. Furthermore, Mālik's knowledge of what he regarded as sunnah was the cri-

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[1]^{c}Iyāḍ, 1:132. [2]Ibid.

terion against which he judged, accepted, rejected, and interpreted ḥadīth, and that concept of sunnah was inseparably connected with Mālik's concept of ᶜamal.

It may be surprising that, although Mālik was highly regarded among the muḥaddith's in general, Mālik, nevertheless, did not take a position toward ḥadīth such as some representatives of 'ahl al-ḥadīth, like ash-Shāfiᶜī, would take of regarding isolated ḥadīth to be a valid, independent source of Islamic law, on the condition that they have been transmitted with sound 'isnād's. The following reports indicate, on the contrary, that it was toward the isolated ḥadīth that Mālik exercised great caution, especially those isolated ḥadīth that have irregular and unusual [shādhdh] meanings and implications. Again, the misgivings and cautions of Mālik reflected in these reports are supported by his general legal theory.

As I mentioned earlier, it is reported that Mālik possessed numerous notebooks--even chests full of notebooks, the reports specify--containing the ḥadīth of az-Zuhrī. Mālik is reported to have said that there were many of these notebooks from which he had never transmitted a single ḥadīth and, furthermore, from which he did not intend to transmit a single ḥadīth as long as he lived.[1] It might appear that Mālik's reason for not transmitting these ḥadīth was because they were non-Madīnan. However that may

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[1]ᶜIyāḍ, 1:148, 151.

be, it is reported that Mālik also had books of Madīnan ḥadīth that he never transmitted. One report has it that when they buried Mālik they found in his house, in addition to seven chests [ṣanādīq] of the ḥadīth of az-Zuhrī, chests containing books of the people of Madīnah from which Mālik had not transmitted anything over the long years that his students who found those books could remember.[1] It is reported further that when Mālik died they found great quantities of the ḥadīth of ᶜAbd-Allāh ibn ᶜUmar--the prominent and authoritative Madīnan Companion--among Mālik's books of which only two ḥadīth had been transmitted in the Muwaṭṭa'.[2]

It is reported that whenever Mālik was informed that a ḥadīth he had transmitted was not transmitted by others or that it was a ḥadīth that heretics ['ahl al-bidᶜah] use as a proof for their views, Mālik would discard that ḥadīth. Ash-Shāfiᶜī is reported to have said in connection with Mālik's standards with regard to ḥadīth that whenever Mālik had doubts about a ḥadīth, he would discard that ḥadīth completely.[3] Mālik warned others against the use of irregular [shādhdh] ḥadīth; it is reported that Sufyān ath-Thawrī, when asked about an irregular ḥadīth, would advise the one who asked him to leave such ḥadīth alone, and Sufyān would

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[1]ᶜIyāḍ, 1:149. [2]Ibid., 1:148.

[3]Ibid., 1:150; Ash-Shāṭibī, Al-Muwāfaqāt, 4:289.

inform him that Mālik had prohibited the use of such ḥadīth.[1] It is reported that a man once commented to Yaḥyā ibn Ma^cīn[2] that Mālik had knowledge of only few ḥadīth. Ibn Ma^cīn replied that Mālik seemed to have knowledge of few ḥadīth because of his high standards of discrimination [bi-kathrat tamyīzihī].[3]

According to another report, the comment was once made to Mālik that Sufyān ibn ^cUyainah[4] possessed ḥadīth which Mālik did not. Mālik is said to have replied: "Shall I transmit to the people everything I have heard? In that case I would be a fool ['aḥmaq]."[5] According to a variant transmission of the same report, Mālik's reply was,". . . in that case I would only be desiring to lead them astray." Mālik then goes on to say: "[As it is] ḥadīth have already

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[1]^cIyāḍ, 1:138.

[2]YAḤYĀ IBN MA^CĪN ibn ^cAwn al-Murrī (158-233/775-847) was a student of Sufyān ibn ^cUyainah, ^cAbd-Allāh ibn al-Mubārak (118-181/736-797)--the prolific writer and famous faqīh, historian, and ṣūfī--and others. Al-Bukhārī and Muslim were students of Ibn Ma^cīn. Ibn Ma^cīn was regarded as a highly trustworthy transmitter of ḥadīth. He also had extensive knowledge of the genealogies and biographies of the muḥaddith's and followed in the tradition of Shu^cbah, who eighty years earlier laid down the foundations for the biographical sciences of ḥadīth. Like his teacher Ibn al-Mubārak, Ibn Ma^cīn possessed an extensive library. Sezgin, 1:106-107, 95.

[3]^cIyāḍ, 1:148.

[4]SUFYĀN IBN ^cUYAINAH ibn Maimūn al-Hilālī (107-196/725-811) was born in Kūfah but grew up in Makkah and became one of the most renowned Makkan muḥaddith's, fuqahā', and Qur'ānic commentators. He was one of ash-Shāfi^cī's Makkan teachers. Sezgin, 1:96, 484.

[5]^cIyāḍ, 1:149-150; ash-Shāṭibī, Al-Muwāfaqāt, 4:289.

come forth from me for each of which I would rather have been whipped than for them to have come forth from me, and I am among the most fearful of people of the whip."[1]

'Abū Zahrah sums up Mālik's attitude toward ḥadīth aptly and indicates that there was a strong connection between it and Mālik's concept of maṣlaḥah. Mālik, he holds, would commit to memory the ḥadīth that he received from his teachers, and he would set down in writing whatever he committed to memory. However, he would examine carefully what he transmitted and transmit only those ḥadīth that met his standards of criticism and would be in the best interest [maṣlaḥah] of the people if divulged and widely circulated.[2] Similarly, Mālik is reported to have advised his student Ibn Wahb--who, as I pointed out earlier, is said to have collected the ḥadīth of Egypt and the Ḥijāz[3]--to beware of those types of ḥadīth and other types of transmitted learning which it is not proper [lā yastaqīm] to transmit.[4] Ibn Wahb is reported to have said:

"If God had not saved me through Mālik and al-Laith[5] I

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[1] ᶜIyāḍ, 1:149-150; Ash-Shāṭibī, Al-Muwāfaqāt, 4:289.

[2] 'Abū Zahrah, p. 88. [3] See above, pp. 74-75, n. 3.

[4] ᶜIyāḍ, 1:151.

[5] 'Abū 'l-Ḥārith AL-LAITH IBN SAᶜD al-Fahmī (94-175/713-791) was an Egyptian contemporary of Mālik and a very highly regarded muḥaddith, faqīh, and historian. He was one of the most highly regarded fuqahā' of his generation. Like Mālik, he was a student of az-Zuhrī and others. Sezgin, 1:520.

would have gone astray." It was said to him, "How is that?" He replied: "I had become too involved with ḥadīth ['akthartu min al-ḥadīth] to the extent that I was becoming confused. I would set forth [what I had heard] before Mālik and al-Laith, and they would say: 'Take this one and discard that one.'"[1]

Mālik came to have considerable prestige and influence in Madīnah. Apparently, he used it to constrain the people of learning in Madīnah to observe standards in transmitting ḥadīth similar to his own. It is reported that until Mālik's death those who transmitted ḥadīth in Madīnah had to beware lest Mālik have them put in jail and require them to correct what they had transmitted before he would permit them to be set free.[2] It is reported that notable Madīnan scholars of Mālik's generation like Ibn Kinānah, Ibn 'Abī Ḥāzim, and ad-Darāwardī[3] refrained from transmit-

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[1]ᶜIyāḍ and Ibn Farḥūn, p. 333, cited by 'Abū Zahrah, p. p. 233.

[2]ᶜIyāḍ, 1:166.

[3]ᶜUthmān ibn ᶜĪsā IBN KINĀNAH (d. ca. 185/ca. 801) was a significant Madīnan faqīh and student of Mālik. Ibn Kinānah was close to Mālik and would always sit at his right side. He was regarded as one of Mālik's most exact and well-studied students. It is reported that Mālik would send Ibn Kinānah to debate with 'Abū Yūsuf on his behalf before the ᶜAbbāsid caliph, when the caliph and 'Abū Yūsuf visited Madīnah on their way to pilgrimage. After Mālik's death Ibn Kinānah took Mālik's place in his circle of students but died six years after Mālik. Ibn ᶜAbd-al-Barr says that ra'y got the better of Ibn Kinānah [ghalaba ᶜalaihī 'r-ra'y] and that he was not noteworthy in ḥadīth. ᶜIyāḍ, 1:292-293; Ibn ᶜAbd-al-Barr, p. 55.

ᶜAbd-al-ᶜAzīz IBN 'ABĪ ḤĀZIM (d. 185/801) was a Madīnan faqīh of mawlā origin. Ibn Maᶜīn regarded him as a trustworthy transmitter of ḥadīth. Ibn Ḥanbal held, however, that Ibn 'Abī Ḥāzim possessed books of ḥadīth that he had not received by way of formal transmission. Neverthe-

ting the ḥadīth of certain scholars during Mālik's lifetime out of deference [haibah] to him.[1]

Mālik as a Teacher and Muftī

'Abū Zahrah concludes on the basis of his comparative biographical studies of the 'imām's of the major sunnī schools and the accounts of their students that, of all these 'imām's, none had students as numerous and from as diverse backgrounds as Mālik. Mālik attracted students from all parts of the Islamic empire; the majority of them came from the Ḥijāz, Egypt, North Africa, Morocco, and Andalusia, but many of Mālik's students came from Syria, Khurāsān, and Iraq as well. Furthermore, Mālik attracted students of all ages; he attracted those who were older than he, those who were the same age as he, and those who were younger. 'Abū Zahrah suggests that one of the main reasons why Mālik's school spread so far through the Islamic world so quickly was because of the large numbers and great diversity of his students.[2]

Mālik's method of teaching and the atmosphere of his circle of students differed from that of 'Abū Ḥanīfah, which

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less, Ibn Ḥanbal regarded him as the best faqīh in Madīnah after Mālik. Ibn ᶜAbd-al-Barr, p. 55.

ᶜAbd-al-ᶜAzīz ibn Muḥammad AD-DARĀWARDĪ (d. 186/802) was a Madīnan muḥaddith who transmitted many ḥadīth but is said to have had a poor memory. He was a mawlā of Khurāsānian background; studied under Sufyān and Shuᶜbah; and was one of ash-Shāfiᶜī's teachers. Ibn Ḥajar, 6:353-355; Zirikli, 4:150.

[1]ᶜIyāḍ, 1:166. [2]'Abū Zahrah, p. 229; cf. ᶜIyāḍ, 1:143.

is said to have been characterized by free discussion and exchange of opinion, consultation [shūrā], and a considerable amount of speculative, hypothetical reasoning.[1] Mālik's circle, on the contrary, was dominated by his personality. The number of questions that one would be permitted to ask were limited, and hypothetical reasoning was strictly discouraged.

Many of those who sat in Mālik's circle held him in great awe [haibah], an awe so great that in some cases it made it impossible for some sitting in Mālik's circle to find the courage they needed to ask him questions. As for those who were not afraid to ask questions the social pressure of Mālik's students was apparently enough to guarantee that they observed whatever etiquette was deemed proper. One man reports that he attended Mālik's circle and asked him a question. When Mālik answered him, he replied with a counter argument; Mālik then replied with a counter argument of his own. Then some of Mālik's students indicated to the man that he should be silent, so he ceased to argue.[2] There is a report of another visitor who attended Mālik's circle and asked two questions, which Mālik answered, and then continued to ask a third, which Mālik refused to answer; when the man lost his patience with Mālik and responded to Mālik's advice that he be less persistent and more

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[1]See al-Kawtharī, pp. 55-56. [2]ᶜIyāḍ, 1:163.

modest by citing a spurious ḥadīth in his favor, several of Mālik's students stood up to the man, pulled his turban from his head, and choked him with it.[1]

One of Mālik's students, Ziyād ibn Yūnus,[2] is reported to have said that he had never seen a man of learning [ᶜālim], a man given to worship [ᶜābid], a shrewd villain [shāṭir], or a governor [wālī] held in greater awe and deference [i.e. 'ahyab] than Mālik.[3] Similarly, Saᶜīd ibn 'Abī Maryam,[4] ad-Darāwardī, and Ibn al-Mājishūn[5] report that

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[1]ᶜIyāḍ, 1:167. The man is reported to have been an Iraqi; the ḥadīth he cited to support the validity of his insistence before Mālik was: "'Idhā kathufa wajh ar-rajul, daqqa dīnuhū" [the rougher (i.e. the more bold and immodest) a man's face becomes, the finer will be his (understanding of) religion]. I assume the ḥadīth is spurious because I could find no reference to it in A. J. Wensinck, Concordance et indices de la tradition musulmane: les six livres, le musnad d'al-Dārimī, le muwaṭṭa' de Mālik, le musnad de Aḥmad ibn Ḥanbal, 7 vols. (Leiden: E. J. Brill, 1937-1943).

[2]ZIYĀD IBN YŪNUS ibn Saᶜīd al-Ḥaḍramī (d. 211/826) was an Alexandrian muḥaddith and was regarded as a great seeker of knowledge. He was nicknamed "sūsat al-ᶜilm" [the woodworm (i.e. that bores through) knowledge]. Other muḥaddith's regarded him as reputable and trustworthy. Ibn Ḥajar, 3:389.

[3]ᶜIyāḍ, 1:166.

[4]SAᶜĪD IBN al-Ḥakam 'ABĪ MARYAM (144-224/761-838) was an Egyptian mawlā and a highly regarded muḥaddith and faqīh. Many regarded him as one of the most intelligent Egyptians of his generation. Ibn Ḥajar, 4:17-18.

[5]ᶜAbd-al-Malik ibn ᶜAbd-al-ᶜAzīz IBN AL-MĀJISHŪN (d. 212/827) was the son of one of the most prominent Madīnan fuqahā' of Mālik's generation, ᶜAbd-al-ᶜAzīz ibn al-Mājishūn (d. 164/780). Their family had come to Madīnah from Persia. ᶜAbd-al-Malik was a student of Mālik and follower of his school, of which it is said that he had a most excellent understanding. Like his father before him, ᶜAbd-

they had never felt in the presence of a caliph or governor the awe mingled with fear [haibah] that they felt for Mālik when in his presence.[1]

Ibn Wahb, one of Mālik's main students, reports that when he first came from Egypt to Madīnah to see Mālik the delegation of Egyptians whom he was with designated Ibn Wahb to ask Mālik on their behalf about whether hermaphrodites should be regarded as male or female for purposes of law. When Ibn Wahb saw Mālik, however, he had such awe of him that he could not find the courage to ask the question nor could anyone else in the Egyptian delegation.[2]

Mālik's students are described as having sat so still in Mālik's presence that it was as if birds were perched

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al-Malik ibn al-Mājishūn was one of the main muftī's of Madīnah in his day. He was also one of the teachers of Saḥnūn. The muḥaddith's regarded him as a weak transmitter of ḥadīth. Zirikli, 4:305; Ibn Ḥajar, 6:407-409.

[1]ᶜIyāḍ, 1:166-167.

[2]Cited by 'Abū Zahrah, p. 100. It is a question which apparently no one ever found the courage to ask Mālik. In the Mudawwanah, when 'Asad ibn al-Furāt--who asks the questions--asks Ibn al-Qāsim--who provides most of the answers--about Mālik's opinion on hermaphrodites, Ibn al-Qāsim replies:

> "I never heard anything from Mālik pertaining to [hermaphrodites], and we never dared to ask anything about them." ['Asad] asked: "Did you ever hear him say anything about what their portion of inheritance would be?" [Ibn al-Qāsim] replied: "No. But I personally prefer that one consider how [a hermaphrodite] urinates; if it urinates from the penis, it is a boy, and if it urinates from the urethra, it is a girl."

See Al-Mudawwanah, 2:187 (17).

upon their heads.[1] When Mālik, as was one of his habits, refused to answer a question or stated that he did not know the answer, few had the courage to ask him a second time. It is said that when Sufyān ath-Thawrī witnessed the great regard in which Mālik's students held him, he composed the following verses:

> Ya'bā 'l-jawāba fa-lā yurāja^c^u haibatan /
> fa-'s-sā'ilūna nawākisu 'l-'adhqāni:
> 'Adabu 'l-waqāri wa ^c^izzu sulṭāni 't-tuqā /
> fa-huwa 'l-muhību wa laisa dhā sulṭāni.
>
> [He refuses to answer but, out of awe, is not asked again; / the beards of those who would ask are lowered in humility: / It is the deportment of reverence, the glory of the power [sulṭān] of righteousness; / he is one who inspires great awe yet possesses no power (sulṭān).][2]

Since many of those who had questions for Mālik found it difficult to ask the questions themselves, Mālik's scribe and reader, Ḫabīb,[3] is reported to have acted frequently as an intermediary to whom they could bring their questions.[4] Ibn Wahb reports the account of a man who came to Madīnah to ask Mālik a question but could not find the courage to

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[1]^c^Iyāḍ, 1:154. [2]Ibid., 1:167.

[3]ḪABĪB IBN Marzūq (or) Rizīn 'ABĪ ḪABĪB (d. 218/833) was Mālik's reader [qāri'] and scribe [kātib]. He was a Madīnan and later settled in Egypt, where he died. He would read about two or two and a half pages before Mālik and his students each day. It is said that Ḫabīb would ask a fee of two pieces of gold [dīnār] for each complete presentation. Many muḥaddith's had a low estimation of Ḫabīb; 'Aḥmad ibn Ḥanbal and Yaḥyā ibn Ma^c^īn are said to have regarded him as a weak [ḍa^c^īf] transmitter if not a liar [kādhib]. Ibid., 1:378-379; cf. 5:56.

[4]Ibid., 1:153-154.

ask it nor could he find anyone else who would ask the question on his behalf. The man is said to have spent ten days not knowing what to do. Finally, after complaining of his problem to the people of Madīnah, he was directed to bring the question to Mālik's scribe, who would ask the question for him.[1]

Mālik was known for his reticence and regarded much talking to be a blemish. He did not permit debates and arguments in his presence, because he felt they led to vanity and removed the light of knowledge. Similarly, he is said to have felt that excessive talking detracted from knowledge and debased it.[2] He regarded much talking to be unmanly and to be characteristic of the weak-minded [ad-duᶜafā']. It is reported that Mālik remarked about a certain person: "What an excellent person he would be but for the fact that he speaks in a single day the words of an entire month."[3]

As indicated before, Mālik refused to answer many of the questions that were posed to him. It was very common that he replied to the questions that were asked him with the words, "lā 'adrī" [I do not know]. One report has it that Mālik was asked forty-eight questions one day to thirty-two of which he answered "lā 'adrī".[4] Furthermore, Mālik instructed his students that they also should make it

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[1]ᶜIyāḍ, 1:168. [2]Ibid., 1:170. [3]Ibid., 1:189.
[4]Ibid., 1:146.

a habit to reply with these words to all questions concerning which they had doubts.[1]

Apparently Mālik preferred reticence and admission of lack of knowledge because, as he explained to Ibn Wahb, the Syrians would go back to Syria, the Iraqis to Iraq, the Egyptians to Egypt taking his opinions with them, while he might alter those opinions after more thought.[2] According to the reports in Mālik's biography, however, Mālik would continue to ponder the difficult questions that were asked him. Mālik is reported to have said that questions would be posed to him that would keep him from eating, drinking, and sleeping.[3] Mālik is reported to have said: "There is a question which I have been reflecting on for more than ten years, but even until now I have not been able to arrive at an opinion [ra'y] on it."[4]

It is reported that a man of high social standing once came to Mālik to ask a question of him. Mālik responded to the question by saying, "I do not know." Thereupon the man lost his patience and said: "The question is trivial [khafīfah; light] and simple. I only wanted to inform the 'amīr [city governor] about it." It is said that Mālik be-

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[1]ᶜIyāḍ, 1:145-146. [2]Ibid., 1:146.

[3]Ash-Shāṭibī, Al-Muwāfaqāt, 4:286; cf. ᶜIyāḍ, 1:145-146.

[4]Ash-Shāṭibī, Al-Muwāfaqāt, 4:286.

came angry and answered:

> A trivial and simple question! There is nothing that pertains to knowledge that is trivial. Have you never attended to what God has said, may He be exalted, [in the Qur'ān]: "Verily, We shall send down upon you a weighty [thaqīl] message."[1] All knowledge is heavy [thaqīl], especially that about which you will be asked on the Day of Resurrection.[2]

Mālik's reticence, his habit of acknowledging lack of knowledge on numerous questions, and his refusal to entertain hypothetical questions posed some problems for his students, who desired to learn Mālik's position on a variety of matters. It is reported that Mālik's students would seek to overcome this problem by the device of finding people who would bring before Mālik the questions his students wanted to be asked under the guise of their being actual problems.[3]

Mālik's Prestige in Madīnah

Mālik's prestige in Madīnah went beyond the circle of his students. It is reported that the governor ['amīr] of Madīnah, the qāḍī, and the muḥtasib [supervisor of the market place and keeper of public morals] kept individual representatives in Mālik's circle to inform them of his opinions.[4] Similarly, it is reported that the fuqahā' of Madīnah would meet with Mālik in special sessions.[5] Although Mālik himself never presided as the qāḍī of Madīnah, it is

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[1]Qur'ān, 73:5. [2]ᶜIyāḍ, 1:147-148. [3]Ibid., 1:151.
[4]Ibid., 1:87-88. [5]Ibid., 1:157.

reported that the city's governor [wālī] occasionally called upon Mālik to exercise the functions of a judge in his presence. It is reported, for example, that Mālik would sit in the governor's presence, and those found guilty in criminal cases would be brought before them, while Mālik would state what punishment should be meeted out to each.[1]

Mālik's relationship with the governors of Madīnah, however, was not always cordial. According to the history of aṭ-Ṭabarī[2] Mālik encouraged the people of Madīnah to support the rebellion of an-Nafs az-Zakīyah[3] against the newly

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[1]ᶜIyāḍ, 1:184.

[2]Muḥammad ibn Jarīr AṬ-ṬABARĪ (ca. 224-310/ca. 839-923) was a great Muslim historian, Qur'ānic commentator, muḥaddith, and grammarian. He also had good knowledge of mathematics and medicine. In law, aṭ-Ṭabarī followed the school of ash-Shāfiᶜī at first but then founded an independent school, called "al-Jarīrīyah". Born in Āmul in Persia, he travelled widely, visiting and studying in Baṣrah, Kūfah, Baghdad, Syria, and Egypt; he studied for a time under 'Aḥmad ibn Ḥanbal. Aṭ-Ṭabarī was one of the most productive of all Muslim scholars. He compiled his works primarily from written sources, and they are among the most important primary sources for modern scholarship. See Sezgin, 1:323-325.

[3]Muḥammad ibn ᶜAbd-Allāh ibn al-Ḥasan ibn al-Ḥusain ibn ᶜAlī ibn 'Abī Ṭālib, called "AN-NAFS AZ-ZAKĪYAH" [the pure soul] (93-145/712-762) was born and grew up in Madīnah. He was regarded as having had great knowledge and as having been very generous and brave. He refused to give the oath of allegiance [al-baiᶜah] to the first ᶜAbbāsid caliphs, as-Saffāḥ and al-Manṣūr; it is said that both of them had given an oath of allegiance to an-Nafs az-Zakīyah secretly during the last days of the 'Umayyad dynasty. An-Nafs az-Zakīyah led a rebellion against them with 250 men and took over Madīnah. The Madīnans then gave him an oath of allegiance as caliph. Thereafter Baṣrah, Makkah, and parts of Persia came under his control. Al-Manṣūr sent 4000 horse soldiers against an-Nafs az-Zakīyah, who was killed and whose forces were crushed in a fierce battle outside the gates of

established ᶜAbbāsid regime.[1] Other reports do not mention Mālik's having given explicit support to an-Nafs az-Zakīyah but indicate that the ᶜAbbāsids considered Mālik as having aided the cause of an-Nafs az-Zakīyah by continuing--despite directions to the contrary--to transmit a ḥadīth according to which the divorce of a man who is forced to divorce his wife is not valid. The analogical implication of the ḥadīth was that the oath of allegiance that the people of Madīnah had given to the ᶜAbbāsids under compulsion was also not valid. Hence, numerous Madīnans renounced their allegiance to the ᶜAbbāsids in favor of an-Nafs az-Zakīyah.[2]

As a result of ᶜAbbāsid disfavor, Mālik was publicly flogged,and his arms were stretched until his shoulders were dislocated. The punishment was carried out during the reign of al-Manṣūr under the direction of the then governor

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Madīnah. It is said that an-Nafs az-Zakīyah was of pure Arab blood from the tribe of Quraish. He is described as having been dark brown and large and heavy-set; some likened his prowess on the battlefield to that of the Prophet's uncle Ḥamzah ibn ᶜAbd-al-Muṭṭalib. Ziriklī, 7:90.

[1]Cited by 'Abū Zahrah, pp. 75-76.

[2]Cited by 'Abū Zahrah, pp. 72-74. Historical accounts of Mālik's miḥnah [inquisition] give two additional reasons for it, both of which 'Abū Zahrah regards as unlikely. The first is that Mālik had insisted that temporary marriages [nikāḥ al-mutᶜah] were prohibited, contrary to the opinion of Ibn ᶜAbbās, the Companion of the Prophet and illustrious ancestor of the ᶜAbbāsids; ibid., p. 72. The second is that Mālik preferred the third caliph, ᶜUthmān, to ᶜAlī. 'Abū Zahrah regards this reason as unlikely because such a position would not have been likely to offend the ᶜAbbāsids, who were not descendants of ᶜAlī. Had Mālik taken such a position, 'Abū Zahrah reasons, it would have been in the favor of the ᶜAbbāsids, since an-Nafs az-Zakīyah was a descendant of ᶜAlī; ibid., p. 74.

of Madīnah, Ja^{c}far ibn Sulaimān. Assuming that Mālik's punishment was in some manner connected with the rebellion of an-Nafs az-Zakīyah, 'Abū Zahrah estimates that it probably took place during the early years of the reign of al-Manṣūr shortly after the death of an-Nafs az-Zakīyah in 145/762. Many reports state that Ja^{c}far ibn Sulaimān carried out the punishment without al-Manṣūr's knowledge or consent. (It seems unlikely to me that Ja^{c}far would, however, have undertaken to publicly punish and humiliate Mālik or any other prestigious Madīnan without the consent of the caliph.) However this may be, other reports have it that al-Manṣūr later apologized to Mālik and was reconciled with him.[1]

Mālik's Work

The Muwaṭṭa' is by far the most important work that Mālik composed. According to al-Qāḍī ^{c}Iyāḍ, however, Mālik composed eight other works as well; ^{c}Iyāḍ states that some of these works were transmitted from Mālik by several people and with sound 'isnād's.[2]

Mālik is alleged to have written a risālah [letter or treatise] to Ibn Wahb on the question of predetermination and free will [al-qadar]. The work is said to have been

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[1]See 'Abū Zahrah, pp. 75-76.

[2]^{c}Iyāḍ, 1:204-207; Sezgin makes no mention of any of these works or that they are still available, Sezgin, 1:457-464. Mālik's letter to al-Laith ibn Sa^{c}d, however, is still available, as indicated below.

transmitted by numerous people and to have been an excellent refutation of those who denied predetermination. A second work attributed to Mālik was a book on stars; it is said to have taught one how to compute the changing of the seasons, the passing of time, and the phases of the moon. ᶜIyāḍ describes it as an excellent work, upon which many have relied.[1]

It is reported that Mālik compiled a special work of ten sections [juz'] on judicial decisions ['aqḍiyah], which he drew up for a certain qāḍī. Similarly, Mālik is said to have composed a risālah dealing with fatwā's; ᶜIyāḍ states that this risālah is well-known.[2] ᶜIyāḍ also mentions Mālik's risālah to al-Laith ibn Saᶜd pertaining to Madīnan ᶜamal, which is transmitted in ᶜIyāḍ's work and elsewhere and is discussed in more detail later.[3]

Mālik is said to have composed an exegetical work on the unusual words of the Qur'ān [tafsīr gharīb al-Qur'ān]. ᶜIyāḍ mentions another work attributed to Mālik entitled, "Kitāb as-Sirr" [the book of secret(s)]; he does not give it

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[1]ᶜIyāḍ, 1:204. [2]Ibid., 1:205.

[3]Ibid., 1:207. ᶜIyāḍ describes this risālah as "short" which would indicate apparently that the other risālah's were longer. It is to be found in ibid., 1:64-65 and Muḥammad ibn 'Abī Bakr IBN QAYYIM al-Jawzīyah, 'Iᶜlām al-Muwaqqiᶜīn ᶜan Rabb al-ᶜĀlamīn, ed. ᶜAbd-ar-Raḥmān al-Wakīl, 4 vols. (Egypt: Dār al-Kutub al-Ḥadīthah, 1969), 3:107-114.

For a discussion of this letter and al-Laith's response to it, see below, pp. 311-330.

much credence, however, and says that little has ever been said about it.[1] It is also said that Mālik wrote a treatise for the ᶜAbbāsid caliph Hārūn ar-Rashīd[2] on proper deportment [ādāb] and spiritual admonitions [mawāᶜiẓ]. The work is said to have been transmitted in Andalusia by Ibn Ḥabīb[3]; however, ᶜIyāḍ states that there is much doubt about its authenticity. Among other things, the work contains weak ḥadīth, the transmission of which--ᶜIyāḍ points out--is contrary to Mālik's principles.[4]

Mālik's Muwaṭṭa'

Mālik's Muwaṭṭa' is one of the oldest and most valuable extant works on Islamic law.[5] Furthermore, it was

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[1]ᶜIyāḍ, 1:206-207.

[2]HĀRŪN AR-RASHĪD ibn Muḥammad [al-Mahdī] ibn al-Manṣūr (149-193/766-809) was the fifth and probably most famous ᶜAbbāsid caliph. He grew up in Baghdad and became caliph in 170/786, while still a young man. It is said that he had extensive knowledge of literature and poetry, fiqh, ḥadīth, and the history of the pre-Islamic Arabs. He was the patron of many ᶜulamā' and poets. Ziriklī, 9:43-45.

[3]ᶜAbd-al-Malik IBN ḤABĪB (174-238/790-852) was a great Mālikī faqīh and historian of Cordova in Andalusia. He made the pilgrimage to Makkah and spent some time thereafter studying in Madīnah and Egypt. It is said that he wrote over a thousand works on various topics. One of these works, his complete history of Andalusia, has come down to us and preserves some of the oldest records of Andalusian history. See Sezgin, 1:468, 362; Ziriklī, 4:302.

[4]ᶜIyāḍ, 1:205.

[5]The works Majmūᶜ al-Fiqh and Manāsik al-Ḥajj wa 'Aḥkāmuhū, attributed to Zaid ibn ᶜAlī (79-122/698-740) are also very early works. There is doubt, however, about their

transmitted by a large number of Mālik's students, and there is little doubt about its authenticity.[1] The transmission of the Muwaṭṭa' that I have relied upon in this dissertation is that of one of Mālik's most reputable students and trans-

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authenticity. Sezgin like E. Griffini, who first published the work in Milan in 1919, regards the works to be authentic. Bergsträsser and Strothmann, however, who wrote about the works in the 1920's, regard them as spurious. Madelung also doubts their authenticity but takes a more moderate stance than Bergsträsser and Strothmann. Whether or not Zaid ibn ᶜAlī did actually compile these works, they go back, nevertheless, to at least the mid second/eighth century, which makes them still early sources. See Sezgin, 1:400, 552-560; Madelung, p. 54.

The manuscripts of two other early works deserve mention. There is the "Kitāb al-'Aṣl" of Sulaim ibn Qais al-Hilālī (d. before 95/714), who is said to have been a transmitter of ᶜAlī ibn 'Abī Ṭālib. Ibn an-Nadīm regards his work as the oldest law book of the shīᶜah. Goldziher, who knew of the work only through reports, regarded it to be spurious. As Sezgin suggests, however, judgment on the work's authenticity should be suspended until the manuscript of the work has been analyzed. See Sezgin, 1:400, 525-526.

There is also a manuscript in aẓ-Ẓāhirīyah Library in Damascus of "Kitāb al-Manāsik" of Qatādah ibn Diᶜāmah (60-118/679-736), a famous Successor. The manuscript is a recension of Qatādah's student Saᶜīd ibn 'Abī ᶜArūbah (70-156/689-773), who was one of the most significant Baṣran muḥaddith's. See Ibid., 1:400, 31-32.

[1]Ibn Taimīyah states that the number of those to whom Mālik transmitted the Muwaṭṭa' has been estimated at about 1700; he suggests that the actual figure would be higher because these estimates were made about three centuries after Mālik's death, when the records of some of his students would have been already lost. See Ibn Taimīyah, p. 33.

Because of the differences between the content of different recensions of the Muwaṭṭa', Goldziher concludes that Mālik authenticated his transmissions of the book in a rather careless manner. Schacht concludes on the same basis that not Mālik but his students edited the work. Sezgin regards these conclusions as inaccurate because of the numerous accounts that Mālik composed the work himself completely and supervised transmission of it. The variations in the recensions reflect, he believes, the regular editorial changes--especially deletions--that Mālik is reported

mitters, Yaḥyā ibn Yaḥyā al-Laithī.[1]

Several reports state that Mālik undertook the compilation of the Muwaṭṭa' at the request of the ᶜAbbāsid caliph al-Manṣūr, who desired to make it a standard law code for his empire. Al-Manṣūr is said to have desired Mālik to perform the task because of his high estimation of Mālik's knowledge and his conviction that the knowledge of the people of Madīnah took priority over that of Iraq and other regions.[2] Al-Manṣūr must not have felt bound, however, by his conviction that the knowledge of Madīnah was superior to that of Iraq, if the reports are true that he tried to constrain 'Abū Ḥanīfah to become one of his qāḍī's.[3]

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to have made in the work over several decades. Sezgin, 1: 458-459.

[1]YAḤYĀ IBN YAḤYĀ ibn Kathīr al-Laithī al-Maṣmūdī (d. ca. 235/ ca. 849) was a native of Cordova and was of Berber background. He travelled to Madīnah at the age of twenty-eight and received the Muwaṭṭa' from Mālik except for the chapters pertaining to iᶜtikāf [seclusion in the mosque during Ramaḍān], which he received from others. Yaḥyā also studied under Ibn Wahb, Ibn al-Qāsim, al-Laith ibn Saᶜd, Sufyān ibn ᶜUyainah, and others. In some matters of law, he preferred the opinions of al-Laith to those of Mālik. His transmission of the Muwaṭṭa' is generally regarded as the best. Yaḥyā ibn Yaḥyā was regarded as highly intelligent and was called "ᶜāqil al-'Andalus" [the most intelligent man of Andalusia]. He was highly regarded as a faqīh and is said to have had excellent judgment in legal matters. His knowledge of ḥadīth, however, was not regarded as especially good. The ruler and common people came to rely exclusively upon his opinion in matters of law; many regarded him as the 'imām of Andalusia in his day. See Ibn ᶜAbd-al-Barr, pp. 58-60; Ibn Ḥajar, 11:300-301.

[2]ᶜIyāḍ, 1:192. [3]See Sezgin, 1:409.

Although al-Manṣūr is reported to have been thinking of constraining his subjects to follow Mālik's book, reports have it that Mālik counselled him against doing that. According to one report, Mālik based his counsel on the consideration of maṣlaḥah, stating that it would be too difficult [shadīd] to force the people of different regions to give up practices that they believed to be correct and which were supported by the ḥadīth and legal opinions that had reached them.[1] Mālik also indicates in these reports that he regards the divergent practices of the Islamic regions to have validity by virtue of the fact that there were similar divergences of practice among the Companions, from whom the peoples of these regions learned their practices.[2]

According to other reports ᶜAbd-al-ᶜAzīz ibn al-Mājishūn[3] was the first in Madīnah to compile a work of the nature of [ᶜalā maᶜnā] Mālik's Muwaṭṭa'.[4] Other reports

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[1]ᶜIyāḍ, 1:192. [2]Ibid.

[3]ᶜAbd-al-ᶜAzīz ibn ᶜAbd-Allāh IBN AL-MĀJISHŪN (d. 164/780) was a great Madīnan faqīh of Mālik's generation and the father of one of Mālik's most notable students, ᶜAbd-al-Malik ibn al-Mājishūn, also a highly regarded Madīnan faqīh. Ibn al-Mājishūn was a mawlā; he came originally from Isfahan in Persia and settled in Madīnah. ᶜAbd-al-ᶜAzīz was a highly regarded ḥāfiẓ of ḥadīth and was considered to be a trustworthy transmitter. He was also held to be highly intelligent and wrote several compilations [taṣānīf]. It is said that Ibn Wahb and others transmitted a compilation [muṣannaf] of his pertaining to statutes of law [al-'aḥkām]. Ibn al-Mājishūn was one of the fuqahā' of Madīnah who gave fatwā's to the people. He died in Baghdad. Ziriklī, 4:305; Ibn Ḥajar, 6:343-344.

[4]ᶜAbd-al-Laṭīf, "Preface" to ash-Shaibānī's recension of the Muwaṭṭa', p. 13; cf. ᶜIyāḍ, 1:195.

state that Ibn al-Mājishūn was the first in Madīnah to make a "Muwaṭṭa'"["'awwal man ᶜamila 'l-Muwaṭṭa'"]; Ibn al-Mājishūn's work, however, is said to have contained only discussions [kalām]--apparently of legal opinions and usages--and not any ḥadīth. The reports continue to say that when Mālik saw Ibn al-Mājishūn's work he commented, "What an excellent piece of work this is. But were it I who had done it, I would have begun by [citing] āthār. Then I would have clarified that ["thumma shaddadtu dhālika"] by adding the discussions [al-kalām]." The reports conclude by stating that Mālik then set his mind to composing the Muwaṭṭa', adding that during those days the ᶜulamā' of Madīnah in general had taken up compiling "Muwaṭṭa's" [al-Muwaṭṭa'āt].[1]

Although these accounts of the origin of the Muwaṭṭa' may be mutually exclusive, it is also possible to harmonize their contrariness. For example, al-Manṣūr's directive regarding the compilation of a book containing the legal knowledge of the people of Madīnah might have been directed toward the Madīnan ᶜulamā' in general and not Mālik exclusively, although he might have expressed special interest in Mālik's undertaking the project. Or once al-Manṣūr's request that Mālik compile such a work became generally known, other Madīnan ᶜulamā' might have been motivated to compile such works themselves in view of caliphal interest in the matter. Whatever the correct explanation of these accounts

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[1]ᶜIyāḍ, 1:195.

may be, the general activity of the Madīnan ᶜulamā' in Mālik's generation of compiling books of the nature of the Muwaṭṭa' appears to have been unprecedented. (Ibn al-Mājishūn is said to have been the first to have done it, and his compilation must have been relatively recent; otherwise one would expect Mālik to have had ample knowledge of it before a copy was brought to him and he became determined to compile a similar work.) Caliphal interest in the compilation of such a work would account well for such widespread and unprecedented activity in Madīnah.

It is reported that Mālik continued to revise the Muwaṭṭa' over a period of more than forty years after its first compilation. The initial compilation of the work must have been considerably larger than the final revisions, since it is reported that Mālik's habit was to delete materials from it at each revision.[1] It is reported that Mālik said to some of his students to whom he had transmitted the Muwaṭṭa': "A book which I have compiled over forty years and you have taken from me in forty days! How little it is that you understand of what is in it."[2]

Finally, I would like to discuss briefly the meaning of the title of Mālik's Muwaṭṭa'. As Azmi has pointed out, the Muwaṭṭa' is exceptional among the compilations of that period by virtue of its having been given a title. Most early compilations of ḥadīth, for example, were known merely

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[1]ᶜIyāḍ, 1:121; cf. Sezgin, 1:458. [2]ᶜIyāḍ, 1:195.

by reference to the name of the compiler.[1] Thus, it is very much to be expected that Mālik intended to indicate something about the content, nature, or purpose of his work by the title he selected.

One report has it that Mālik presented his work to many [lit.,"seventy"] of the fuqahā' of Madīnah and that they all concurred with him on its validity [wāṭa'anī ᶜalaihī]. Thus, the report concludes, Mālik named his work, "al-muwaṭṭa'", which comes from the same verbal root.[2] This report seems unlikely, however, because the noun and adjective forms of the verb "wāṭa'a", used in the above expression, would be "muwāṭa'ah" or "wiṭā'" or "muwāṭa'" but not "muwaṭṭa'", which is the noun of place or time of the second form verb of the same root.

The first form verb "waṭa'a" means primarily "to press or bear down upon something with hand or foot" and, hence, "to tread or trample upon." The second form of the verb, "waṭṭa'a", from which "muwaṭṭa'" comes, means "to prepare or make smooth, easy, and soft for travelling, walking, riding, or laying upon", i.e. as if by frequent treading, rid-

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[1]Azmi, pp. 298-299; cf. Jalāl-ad-Dīn ᶜAbd-ar-Raḥmān as-Suyūṭī, Tanwīr al-Ḥawālik: Sharḥ ᶜalā Muwaṭṭa' Mālik, 3 vols. in 1 (Egypt: Dār 'Iḥyā' al-Kutub al-ᶜArabīyah, n.d.), 1:7. Azmi notes that, although al-Bukhārī and Muslim borrow extensively from Mālik's Muwaṭṭa', they follow the traditional procedure of citing his name in the 'isnād and not the title of his work; Azmi, pp. 298-299.

[2]As-Suyūṭī, 1:7.

ing, or laying upon, as the case may be. It may also mean "to tread or ride upon excessively much." The sense of "agreement" that the third form of the verb, "wāṭa'a", carries is said to be figurative, its concrete meaning being "to tread in the footsteps of another" and, hence, "to be in agreement with another".[1]

I prefer to translate "al-muwaṭṭa'" as "the much-trodden path" with the implication that the path is smooth and easy to follow by virtue of its being well-trodden. As such "al-muwaṭṭa'" is, I believe, a figurative reference to the ᶜamal of Madīnah, which is generally reflected throughout the Muwaṭṭa' and is Mālik's primary source of reference for evaluating and interpreting the ḥadīth, āthār, and various legal opinions that the work contains.

Unlike the Mudawwanah, which in addition to examples of Madīnan ᶜamal contains a very considerable portion of Mālik's ijtihād [independent judgment in legal matters] in matters without precedent, the Muwaṭṭa' in terms of its content is essentially a source book of the accepted precedents and established principles of the Madīnan school of law. The Muwaṭṭa' contains examples of Mālik's ijtihād as well, but they are relatively few compared with the Mudawwanah.

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[1]Edward William Lane, An Arabic-English Lexicon: Derived from the Best and Most Copious Eastern Sources, 8 vols. (London: Williams and Norgate, 1863; reprint ed., Beirut: Librairie du Liban, 1968), 8:2948-2949, s.v. "WṬ'".

I believe that Mālik's choice of title reflects his purpose of making the Muwaṭṭa' essentially a source book of accepted precedents and established principles and precepts of the Madīnan school that are embodied in Madīnan ᶜamal and should serve as the point of departure from which the mujtahid [one who does ijtihād] sets out to solve legal questions without precedent. Mālik sets forth the fundamental precepts of the Madīnan school in the Muwaṭṭa' quite articulately, and, according to my analysis of the terminology he uses in conjunction with these precepts, Mālik indicates the types of Madīnan ᶜamal from which they come and whether or not there had been consensus upon that precept among the Madīnan ᶜulamā'.[1] It might also be pointed out in connection with these observations about the Muwaṭṭa' and Mudawwanah that, as a source book, the Muwaṭṭa' is especially well-suited for the study of Mālik's concept and application of ᶜamal, while the Mudawwanah is better-suited for the study of Mālik's ijtihād in matters without precedent and his application of principles like istiḥsān, sadd adh-dharā'iᶜ, and al-maṣāliḥ al-mursalah.

It might also be noted that the metaphor in "muwaṭṭa'" of a path that is much-trodden and easy to follow is similar to the Qur'ānic metaphor of "aṣ-ṣirāṭ al-mustaqīm" [the

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[1]For discussions of Mālik's terminology and its connection with the precepts of the Muwaṭṭa' see below, pp. 516-760.

straight way that is broad and open], which the believers are supposed to follow.[1] It is also akin semantically to the meaning of the word "madhhab" [the course along which one proceeds], which later became a term for designating "school of law".

The metaphor of a muwaṭṭa', a much-trodden path that is easy to follow, is an apt description, I believe, of how Mālik conceived of ᶜamal. It conveys the sense of a "habitual legal practice", for a muwaṭṭa' is walked upon regularly and as a matter of habit. It conveys the sense of "normativeness" and the sense of "simplicity and ease", all of which seem to be parts of Mālik's conception of ᶜamal. Since a muwaṭṭa' is taken regularly, it is also well-known. In this sense, muwaṭṭa' is opposed to that which is irregular and uncommon [shādhdh] and, hence, similar perhaps to the concept implied by the Ḥanafī usages, "as-sunnah al-maᶜrūfah" [the well-known sunnah] and "as-sunnah al-maḥfūẓah al-maᶜrūfah" [the well-known sunnah, preserved (in practice)].[2]

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[1]Qur'ān, 1:6; 2:142, 213; 3:51, 101; 5:16; 6:39, 87, 126, 161; and passim.

[2]See 'ABŪ YŪSUF Yaᶜqūb ibn 'Ibrāhīm, Ar-Radd ᶜalā Siyar al-'Awzāᶜī, ed. 'Abū 'l-Wafā' al-'Afghānī (Haidarabad: Lajnat 'Iḥyā' al-Maᶜārif an-Nuᶜmānīyah, 1357/1938), pp. 32, 49, 66-67; cf. pp. 24-25, 29-31, 63-64, 103-105, 134-135.

Al-Mudawwanah al-Kubrā

The Mudawwanah is one of the major sources of Mālik's legal opinions. As I indicated earlier, the Mudawwanah contains a much larger proportion of Mālik's independent legal judgments than the Muwaṭṭa', which is essentially a source book of the established precepts of the Madīnan school. One gets a much clearer picture in the Mudawwanah of Mālik as a mujtahid in unprecedented problems of great variety. No study of Mālik and his legal reasoning would be complete without a study of the Mudawwanah.

The story of the compilation of the Mudawwanah revolves around three men: ᶜAbd-ar-Raḥmān ibn al-Qāsim, 'Asad ibn al-Furāt, and Saḥnūn.[1]

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[1]For data on Ibn al-Qāsim see above, p. 42, n. 2.

'ASAD IBN AL-FURĀT ibn Sinān (142-213/759-828) came to Qairawān as a child from Ḥarrān, where he was born. He later returned eastward to study the Muwaṭṭa' with Mālik and to study under 'Abū Yūsuf and ash-Shaibānī in Iraq. 'Asad was a renowned faqīh, and the 'Aghlabid ruler Ziyādat-Allāh ibn 'Ibrāhīm appointed him qāḍī of Qairawān. 'Asad led the expedition of conquest to Sicily in 210/826 and died almost two years later during the siege of Syracuse. It is said that 'Asad chose to follow the Ḥanafī school in his rulings as qāḍī of Qairawān and that, for that reason, the Ḥanafī school spread for some time in North Africa, even reaching as far as the borders of Andalusia. See Sezgin, 1:467; 'Abū Zahrah, p. 237.

ᶜAbd-as-Salām ibn Saᶜīd ibn Ḥabīb at-Tanūkhī, called "SAḤNŪN" [joyous bird] (160-240/776-854) was a native of Qairawān; it is said that he was given his nickname, Saḥnūn [joyous bird], because of his great energy and vitality. He studied under Ibn al-Qāsim, Ibn Wahb, and numerous other prominent students of Mālik. There is some question as to whether or not he ever saw Mālik. He did study under several of Mālik's students in Makkah, Madīnah, and Syria during and after his journey to the pilgrimage. Saḥnūn returned to Qairawān in 191/806 and was appointed qāḍī there in 234/

The project of compiling the Mudawwanah began with 'Asad ibn al-Furāt, who brought with him from Iraq the idea of compiling a work that would set forth Mālik's opinions on the various legal questions of the Iraqis.[1] 'Asad learned when he returned to Madīnah that Mālik had already died. It is said that he first took his project to Ibn Wahb but found him unwilling to cooperate. 'Asad then turned to another student of Mālik, 'Ashhab,[2] who was also a student and personal secretary of Ibn Wahb. He soon ceased to be interested in 'Ashhab, however, because 'Ashhab disagreed too frequently with Mālik. Finally, 'Asad brought the project to Ibn al-Qāsim, whom he convinced to cooperate with him, despite Ibn al-Qāsim's initial unwillingness.[3]

'Abū Zahrah holds that the Ḥanafī school contributed greatly, albeit indirectly, to the growth of the Mālikī school

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849. It is said that Saḥnūn accepted the appointment on the condition that he not be required to receive a salary or any gifts. He held the position for several years, never receiving any salary. Saḥnūn is also said to have had more students than any other of Mālik's followers; he was very influential in spreading the Mālikī school through North Africa. See Sezgin, 1:468; 'Abū Zahrah, p. 239.

[1]See Ibn Rushd [al-Jadd], 1:27-28; 'Abū Zahrah, pp. 236-237, 248; and Sezgin, 1:465.

[2]'ASHHAB ibn ᶜAbd-al-ᶜAzīz al-Qaisī (145-204/762-819) was an Egyptian student of Mālik and also a student of Ibn Wahb as well as his personal secretary. 'Ashhab was considered to be a trustworthy transmitter of ḥadīth and a highly competent faqīh. He died only days after the death of ash-Shāfiᶜī. Sezgin, 1:466.

[3]See Ibn Rushd [al-Jadd], 1:27-28; 'Abū Zahrah, pp. 236-237, 248; and Sezgin, 1:465.

through 'Asad's project to compile the Mudawwanah after the pattern of the works he had studied under 'Abū Yūsuf and ash-Shaibānī. One of the benefits of the hypothetical reasoning that characterized the Ḥanafī school--'Abū Zahrah holds--was that it facilitated the precise and systematic solution of a wide variety of legal questions, which led to extensive elaboration of the law and made more articulate the precepts and principles to which the school subscribed. Similarly, through 'Asad's project to compile the Mudawwanah Mālikī fiqh was systematically elaborated and expanded for the first time. Mālik himself had opposed the use of hypothetical reasoning, which--'Abū Zahrah believes--had not hampered him, because of the great variety of legal problems that were brought to him in Madīnah, and had tended to keep Mālik's legal opinions very practical and tied fundamentally to considerations of maṣlaḥah.[1] In cooperating with 'Asad ibn al-Furāt in the compilation of the Mudawwanah, however, Ibn al-Qāsim applied himself to the hypothetical questions of the Iraqis. If he knew of Mālik's having answered one of 'Asad's questions, he cited Mālik's opinion. However, when Mālik was not known to have expressed an opinion on any of these questions, Ibn al-Qāsim attempted to answer the question himself on the basis of Mālik's reasoning in other matters.[2]

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[1] 'Abū Zahrah, pp. 18-19; see also above, p. 60.

[2] 'Abū Zahrah, pp. 438-439.

Ibn al-Qāsim responds to 'Asad's questions in the Mudawwanah in various ways, and it is always easy to distinguish between Ibn al-Qāsim's opinions and those of Mālik. If Ibn al-Qāsim is certain of Mālik's opinion in a matter, he will transmit it formally, saying something like, "I heard Mālik say this about it" or "Mālik said . . . " When Ibn al-Qāsim does not remember having heard Mālik say anything on the matter but has heard reports of Mālik's opinion on it from others of his students, he will say something like, "I have heard nothing from Mālik on this, but it has reached my attention [balaghanī ᶜanhū] that he said this about it . . .". Occasionally, Ibn al-Qāsim is not sure of Mālik's opinion in a matter but recalls that Mālik seems to have said a certain thing. In such cases, Ibn al-Qāsim indicates his conjecture by using the words "'akhālu" [it seems to me], "'aẓunnu" [I conjecture], or "'aḥsabu" [I think]; such instances, however, are relatively rare.[1]

For many of the questions that 'Asad asks in the Mudawwanah, however, Ibn al-Qāsim has never heard an answer from Mālik nor from any of his students. In such cases, he often calls to mind an analogical problem for which Mālik has given an opinion, and Ibn al-Qāsim will answer 'Asad's question by drawing the analogy. For some questions, however, Ibn al-Qāsim is unable to find an analogy in Mālik's

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[1]See 'Abū Zahrah, p. 247; Ibn Rushd [al-Jadd], 1:27-28.

legal opinions; in such cases he does ijtihād on the basis of his understanding of Mālik's legal reasoning. He will refer to his conclusion, however, as his own opinion [ra'y]. Often he will say, for example, "I have heard nothing from Mālik pertaining to this, nor has anything on it that he said been brought to my attention; however, my opinion in the matter is . . .".[1] It should also be noted that there are many instances in the Mudawwanah when Ibn al-Qāsim sets forth Mālik's opinion in a matter but disagrees with it and also states his opinion to the contrary. Ibn al-Qāsim will often add his reasons for disagreeing with Mālik as well. Furthermore, he frequently indicates whether Mālik changed his opinion on matters, what his earlier opinion had been, and what opinion he held before he died.[2]

"Al-'Asadīyah"

This first compilation which 'Asad ibn al-Furāt put together in cooperation with Ibn al-Qāsim is referred to

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[1]See Ibn Rushd [al-Jadd], 1:27-28; 'Abū Zahrah, p. 247.

[2]For illustrations of Ibn al-Qāsim's distinguishing between Mālik's opinions and his own; stating that he does not recall Mālik's opinion in a given matter; indicating that one of Mālik's opinions is old while another is the opinion he held before he died; stating that Mālik's students would continue year after year to ask him certain questions to see if he had retracted them; and disagreeing with Mālik's opinions, see: Al-Mudawwanah, 1:20 (13), 57 (13), 69 (8), 69 (14), 100 (15), 192 (21), 251 (4), 256 (18), 264 (10), 272 (4), 272 (13), 284 (13), 289 (4), 294 (11); 2:189 (23), 197 (27), 391 (15); 3:86 (13); 4:92 (19), 94 (2), 116 (18).

as "Al-'Asadīyah" after 'Asad ibn al-Furāt. It is also referred to as "Al-Mukhtaliṭah" [that which is mixed or confused], because of its lack of systematic organization.[1] Although Ibn al-Qāsim answered 'Asad's questions in the "'Asadīyah" in the same manner in which he answers them in the Mudawwanah, Ibn al-Qāsim was apparently much less certain about many of Mālik's opinions that he transmits in the "'Asadīyah". It is said that one of the complaints that the people of North Africa brought against 'Asad's compilation was that "what you have brought us is ''akhālu", ''aẓunnu', and ''aḥsabu'." Furthermore, unlike the Mudawwanah, the "'Asadīyah" apparently contained legal opinions almost exclusively, without āthār and references to the established practices of the first generations, and this complaint was also brought against it.[2]

Saḥnūn's Mudawwanah

Al-Mudawwanah al-Kubrā [the major compilation] is Saḥnūn's revision of the "'Asadīyah". He met the criticisms mentioned above by verifying Mālik's opinions with Ibn al-Qāsim more exactly, and he added much additional information,

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[1]Sezgin, 1:467; 'Abū Zahrah, p. 237. Sezgin cites references to several manuscripts that contain substantial portions of the "'Asadīyah"; some of them, for example, are Mālikī commentaries on the "'Asadīyah" and the Mudawwanah jointly. Sezgin, 1:467.

[2]ᶜIyāḍ, cited by 'Abū Zahrah, pp. 247-248.

ḥadīth, āthār, legal opinions of Successors, citations from 'Abū 'z-Zinād ibn Dhakwān's work on the Seven Fuqahā', and so forth--which generally come toward the end of each chapter. Saḥnūn also organized 'Asad's work much more systematically, although portions of it remain unorganized after the manner of the "'Asadīyah".[1]

After Saḥnūn had revised the "'Asadīyah" under Ibn al-Qāsim, Ibn al-Qāsim wrote to 'Asad ibn al-Furāt, requesting him to revise his compilation according to the alterations in Saḥnūn's revision. It is said that 'Asad became infuriated at the suggestion, while Ibn al-Qāsim in turn lost patience with 'Asad. In accordance with the wishes of Ibn al-Qāsim, however, it is said that the people ceased to attach authority to the "'Asadīyah" after that time and turned instead to the Mudawwanah of Saḥnūn.[2]

"Al-Mawwāzīyah"

The Mudawwanah is not the only early source of Mālik's legal opinions. There are other early source works as well, although they exist as yet in manuscripts and have not been published or carefully studied by modern scholars. One of these works is "Al-Mawwāzīyah" named after the early Alex-

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[1]Sezgin, 1:465; 'Abū Zahrah, pp. 248, 243.

[2]'Abū Zahrah, p. 248.

andrian Mālikī faqīh Ibn al-Mawwāz[1], the analysis of which might prove to be of immense value to the history of Mālikī legal theory.[2] ᶜIyāḍ describes the "Mawwāzīyah" as one of the most brilliant ['ajall] books that Mālikīs have ever compiled. He claims further that it is among the most authentic with regard to Mālik's legal opinions, that it contains the most extensive discussions ['absaṭuhū kalāman], and that it is the most comprehensive ['awᶜabuhū]. It has also been said of "Al-Mawwāzīyah" that it takes precedence over other Mālikī source books ['ummahāt], because Ibn al-Mawwāz compiled the work in such a manner as to indicate systematically the connection between specific legal deductions [furūᶜ] and the basic principles and established precepts of Mālikī fiqh ['uṣūlihim]. Other compilers in contrast to Ibn al-Mawwāz were primarily concerned with gathering various transmissions of Mālik's opinions.[3]

It is also reported that a section of the "Mawwāzīyah" is devoted to the refutation of ash-Shāfiᶜī's criticisms of Mālik. Ibn al-Mawwāz's refutation is regarded by some Mā-

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[1]Muḥammad ibn 'Ibrāhīm ibn Ziyād IBN AL-MAWWĀZ (180-269 or 281/796-882 or 894) was an Alexandrian and a student of several of the renowned Egyptian Mālikīs of his age. He is regarded highly in the Mālikī school because of his efforts to systematize Mālikī fiqh; Sezgin, 1:474.

[2]An old parchment of several parts of the "Mawwāzīyah" has been preserved in the private collection of Muḥammad aṭ-Ṭāhir ibn ᶜAshūr in Tunis; ibid.

[3]ᶜIyāḍ and Ibn Farḥūn, cited by 'Abū Zahrah, pp. 244-245.

likīs as the most excellent of its kind.[1] (It should be noted that several other early Mālikīs, including Saḥnūn, are reported to have written refutations of ash-Shāfiᶜī.[2])

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[1]ᶜIyāḍ and Ibn Farḥūn, cited by 'Abū Zahrah, p. 245.

[2]See Preface, ᶜIyāḍ, 1:27-28. In addition to Ibn al-Mawwāz and Saḥnūn, the following are said to have written refutations of ash-Shāfiᶜī:

(1) IBN ᶜABD-AL-ḤAKAM. This would be either ᶜAbd-Allāh IBN ᶜABD-AL-ḤAKAM (155-214/772-829)--who was born in Alexandria, studied the Muwaṭṭa' under Mālik, and developed a reputation in Egypt as a great faqīh (Sezgin, 1:467)--or his son Muḥammad ibn ᶜAbd-Allāh IBN ᶜABD-AL-ḤAKAM (182-268/799-882). It is most likely, I believe, that the reference is to Muḥammad ibn ᶜAbd-al-Ḥakam because he studied under ash-Shāfiᶜī in Egypt, followed his school for a time, and then turned against him and returned to the Mālikī school. Muḥammad ibn ᶜAbd-al-Ḥakam was a great Egyptian authority on ḥadīth, Qur'ān, and fiqh (Sezgin, 1:474).

(2) Yaḥyā ibn ᶜUmar AL-KINĀNĪ (213-289/828-902). He was a Cordovan and studied under Ibn Ḥabīb. He then travelled to Qairawān, where he studied under Saḥnūn. Thereafter he made his way to Egypt and the Ḥijāz, studying there under other prominent Mālikī fuqahā'. Al-Kinānī was regarded as very precocious. He became a rigorous scholar and critical thinker. After returning to Qairawān, where he settled, he became regarded as the greatest living authority there on the Muwaṭṭa' and Saḥnūn's Mudawwanah (Sezgin, 1:475).

(3) 'Abū 'Isḥāq 'Ismāᶜīl ibn 'Isḥāq AL-JAHḌAMĪ (199-282/815-895). He was born in Baṣrah and became one of the great Mālikī fuqahā' of the Mālikī school of Baghdād. His writings are said to have pioneered the spread of Mālikī teachings. He was appointed qāḍī al-quḍāt in Baghdād and remained a qāḍī there until his death. He was also noted as a Qur'ānic exegete, muḥaddith, and historian. Al-Khaṭīb al-Baghdādī describes his works "'Aḥkām al-Qur'ān", "Al-Qirā'āt", and "Maᶜānī 'l-Qur'ān" as unmatched and irreplaceable. The philologists al-Mubarrad and 'Abū Bakr ibn al-'Anbārī were also students of his. Some of al-Jahḍamī's manuscripts are still available (Sezgin, 1:475-476; ᶜIyāḍ, 1:27-28).

(4) 'ABŪ BAKR ᶜAbd-Allāh ibn Muḥammad AL-MĀLIKĪ (d. after 453/1061). He was a noted historian and faqīh of Qairawān (Sezgin, 1:360; Ziriklī, 4:266).

(5) 'Abū ᶜUthmān Saᶜīd ibn Muḥammad AL-GHASSĀNĪ, called "IBN AL-ḤADDĀD" (219-302/834-915). He was one of the prominent ᶜulamā' of Qairawān and won great fame as a polemicist, especially against the Fāṭimid ᶜulamā'. He wrote numerous works. Ziriklī, 3:154; Sezgin, 1:601.

It should be noted, finally, that Ibn al-Mawwāz was regarded by later Mālikīs as having been very important in establishing and spreading the Mālikī school, as reflected by the saying: "Were it not for the two shaikh's, the two Muḥammads, and the two qāḍī's the Mālikī school would have passed away." The two shaikh's are explained as having been Ibn 'Abī Zaid of Qairawān and al-'Abharī of Baghdad.[1] The two Muḥammads were Muḥammad ibn Saḥnūn[2] and Muḥammad ibn al-Mawwāz. The two qāḍī's were the two famous Mālikī legal theorists of Baghdad: al-Qāḍī Ibn al-Qaṣṣār and al-Qāḍī ᶜAbd-al-Wahhāb.[3]

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[1]ᶜAbd-Allāh IBN 'ABĪ ZAID ᶜAbd-ar-Raḥmān (310-386/922-996) was born in Qairawān but came from Spanish background. He began at an early age to study under the prominent Mālikī scholars of Qairawān. He then travelled to the East for pilgrimage and furthered his studies there. Ibn 'Abī Zaid came to be regarded as one of the most learned Mālikīs of his age and was called "Mālik of the later generations". He is best known for his Risālah, which is a very clear and simple presentation of Mālikī fiqh for the common man and elementary students. See Sezgin, 1:478.

'Abū Bakr Muḥammad ibn ᶜAbd-Allāh AL-'ABHARĪ (287-375/900-985) lived in Baghdad and was one of the most important early representatives of the Mālikī school of Baghdad. He taught in Baghdad for about sixty years and is reported to have done much debating of Ḥanafīs and Shāfiᶜīs. Ibid., 1:472.

[2]MUḤAMMAD IBN SAḤNŪN ᶜAbd-as-Salām ibn Saᶜīd (202-256/817-870) was born in Qairawān, where he studied under his father, Saḥnūn, and other prominent Mālikī scholars. Later he travelled to the East and furthered his study in Makkah and Madīnah. Muḥammad ibn Saḥnūn was even more highly regarded as a Mālikī scholar than his father. In addition to fiqh, he had extensive knowledge of history. Ibid., 1: 472.

[3]Citation from al-Qarāfī, 1:17.
AL-QĀḌĪ 'Abū 'l-Ḥasan ᶜAlī ibn ᶜUmar IBN AL-QAṢṢĀR

"Al-Wāḍiḥah"

Another important early source book of Mālik's opinions is "Al-Wāḍiḥah", which was compiled by the famous Andalusian Mālikī faqīh Ibn Ḥabīb.[1] It was also highly regarded among Mālikīs, many of whom regarded it as taking second place only to the Mudawwanah. The Mālikīs of Andalusia are said to have relied primarily on the "Wāḍiḥah" and the "ᶜUtbīyah", which I will discuss next. At least parts of the "Wāḍiḥah" are still available in manuscript.[2]

(d. 398/1008) was a student of al-'Abharī and later qāḍī of Baghdad. Ibn al-Qaṣṣār is regarded as one of the most significant scholars of the Mālikī school. He is especially important in that he was among the first of the Mālikī legal theorists. A manuscript still exists in Al-'Azhar of his treatise on legal theory, "Al-Muqaddimah fī 'Uṣūl al-Fiqh", and there are several manuscripts of his "ᶜUyūn al-'Adillah fī Masā'il al-Khilāf baina Fuqahā' al-'Amṣār", which is regarded as the best Mālikī work on the subject of the divergence of legal opinions among the schools. Sezgin, 1:481-482.

AL-QĀḌĪ 'Abū Muḥammad ᶜAbd-al-Wahhāb ibn ᶜAlī ibn Naṣr AL-BAGHDĀDĪ (362-422/973-1031) was born in Baghdad and later became qāḍī of various cities in Iraq. Later he travelled to Syria and then to Egypt, where he gained much renown. He died in Egypt. Al-Qāḍī ᶜAbd-al-Wahhāb is another famous Mālikī legal theorist of the school of Baghdad. The following verses are attributed to him:

Baghdādu dārun li-'ahli 'l-māli ṭayyibatun /
wa li-'l-mafālīsi dāru 'ḍ-ḍanki wa 'ḍ-ḍīqi:
Ẓalaltu ḥairāna 'amshī fī 'aziqqatihā /
ka'annīya muṣḥafun fī baiti zindīqi.

[Baghdad, for those who have wealth, is a comfortable place; / for the money-less, a place of exasperation and misery: / wandering through her alleyways, I remained confused and perplexed, / as if I were a Qur'ān in the house of an atheist.]

Ziriklī, 4:335.

[1]For data on Ibn Ḥabīb see above, note 3, p. 97.

[2]See Sezgin, 1:362.

"Al-ᶜUtbīyah"

A fourth early source book of Mālik's opinions is "Al-ᶜUtbīyah", which took its name from its compiler, the Cordovan Mālikī faqīh al-ᶜUtbī.[1] It is said to have been taken primarily from "Al-Wāḍiḥah", and the purpose of the work, as indicated by its full title--"Al-Mustakhrajah min al-'Asmiᶜah mimmā Laisa fī 'l-Mudawwanah" [extracts of narrations not contained in the Mudawwanah]--was to complement the Mudawwanah.[2] The "ᶜUtbīyah" was relied upon heavily in parts of Andalusia and North Africa.

Many traditional Mālikī fuqahā' have doubted the authenticity and value of the "ᶜUtbīyah". Muḥammad ibn ᶜAbd-al-Ḥakam[3], a contemporary of al-ᶜUtbī, is reported to have said that he found most of the "ᶜUtbīyah" to be "lies, opinions without any basis ["masā'il lā 'uṣūl lahā"]." Ibn Lubābah[4], a famous Andalusian faqīh, is said to have

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[1]Muḥammad ibn 'Aḥmad AL-ᶜUTBĪ (d. 255/869) was born and lived in Cordova. Later he travelled to the East, where he furthered his studies under many of the most prominent fuqahā' of that time. When he returned to Andalusia, he became one of its most influential Mālikī scholars. Sezgin, 1:472.

[2]Numerous manuscripts of "Al-ᶜUtbīyah" are still available; see ibid.

[3]For data on Muḥammad ibn ᶜAbd-al-Ḥakam see above, note two, p. 115, n. n. 2.

[4]Muḥammad ibn Yaḥyā ibn ᶜUmar IBN LUBĀBAH (d. 330/942) was a famous Cordovan faqīh, qāḍī, and member of the judicial council [shūrā]. He was also known as "al-Bawjūn." Ibn Lubābah studied in Qairawān and later went to Egypt, where he died. One of his works, "Al-Muntakhabah", is re-

commented that the "ᶜUtbīyah" contained many transmissions that had been rejected and many irregular opinions [al-masā-il ash-shādhdhah].[1]

Other Source Books

"Al-Mawwāzīyah", "Al-Wāḍiḥah", and "Al-ᶜUtbīyah" are the three primary sources of Mālik's legal opinions in addition to the Mudawwanah.[2] Some other early source works, however, deserve mention.

Manuscripts still exist of "Al-Mukhtaṣar al-Kabīr fī 'l-Fiqh" of ᶜAbd-Allāh ibn ᶜAbd-al-Ḥakam.[3] Ibn ᶜAbd-al-Ḥakam is said to have compiled two works, both of which were relied upon heavily by the Mālikīs of Baghdad. The first was a compilation of transmissions he had heard personally from Mālik and some of Mālik's most important students like Ibn al-Qāsim, Ibn Wahb, and 'Ashhab. The second work was a condensed version of this first.[4] It would appear that the manuscript is of this second work.

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garded to have been a most excellent work on fiqh; he also wrote a work on written legal contracts [wathā'iq]. See Ziriklī, 8:4; Kaḥḥālah, 12:107-108.

[1]ᶜIyāḍ and Ibn Farḥūn, cited by 'Abū Zahrah, p. 240.

[2]See ibid., p. 244.

[3]Sezgin, 1:467. For data on ᶜAbd-Allāh ibn ᶜAbd-al-Ḥakam, see above, note two, p. 115.

[4]'Abū Zahrah, p. 238.

Finally, it is reported that 'Ashhab also compiled a work containing Mālik's legal opinions, which is called "Mudawwanat 'Ashhab" or "Kutub 'Ashhab". ᶜIyāḍ says of 'Ashhab's compilation that it was large and excellent, containing much knowledge. Reports also have it that Ibn al-Qāsim and 'Ashhab vied with each other regarding which of their compilations was superior.[1] Sezgin makes no mention of manuscripts of this compilation; however, a manuscript is still available of 'Ashhab's "Kitāb al-Ḥajj" in a recension of Saḥnūn, which may be a part of 'Ashhab's "Mudawwanah".[2]

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[1]ᶜIyāḍ, cited by 'Abū Zahrah, pp. 235-236.

[2]See Sezgin, 1:467.

CHAPTER III

SOME PRELIMINARY FUNDAMENTALS OF MĀLIKĪ LEGAL THEORY

Introduction

"Classical Islamic Legal Theory"

One occasionally encounters in the writings of modern Muslim and non-Muslim scholars on Islamic law references to a "classical" Islamic legal theory. This "classical" theory is generally understood to be the theory that Islamic law consists of four sources: the Qur'ān, the sunnah of the Prophet (as constituted by ḥadīth), 'ijmā^c, and qiyās [analogical reasoning]. Furthermore, the notion of such a "classical" legal theory implies that a theory of Islamic law emerged during the formative period which came to have general acceptance among sunnī Muslims.

No doubt, there is considerable common ground in the legal theories of the four major sunnī schools of law. It is also to be expected that there was a considerable exchange of ideas and theoretical formulations and terminologies between the legal theorists of each of these schools. Nevertheless, there have always been fundamental and distinctive differences between the legal theories of each of

these four sunnī schools, both before and after ash-Shāfiᶜī.

The theory of Islamic law which limits the sources of law to the Qur'ān, the sunnah (as constituted by musnad ḥadīth [ḥadīth with complete 'isnād's]), 'ijmāᶜ, and qiyās is, properly speaking, Shāfiᶜī legal theory.[1] It may be regarded as "a classical" theory of Islamic law but not as "the classical" theory. For ash-Shāfiᶜī's theory--even though that may have been what he desired--did not bring about a major compromise in the other schools that produced a unified sunnī legal theory, rather it effected the development of a new and independent sunnī school of law.

Ḥanafī legal theory, even after ash-Shāfiᶜī, continued, for example, to accept mursal ḥadīth [ḥadīth with incomplete 'isnād's] as legitimate sources of law, although ash-Shāfiᶜī had rejected them. Likewise it continued to regard the āthār and fatwā's of prominent Companions to be an important ancillary in establishing the content of the Prophetic sunnah. Ḥanafī legal theory, furthermore, continued to place numerous restrictions--some of which I have

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[1]See 'Abū Zahrah, Mālik, p. 451. For a good introductory treatment of ash-Shāfiᶜī's legal theory, based on his writings, his legal deductions, and the writings of prominent Shāfiᶜī legal theorists, see idem, Ash-Shāfiᶜī: Ḥayātuhū wa ᶜAṣruhū, Ārā'uhū wa Fiqhuhū (Egypt: Dār al-Fikr al-ᶜArabī, 1948), pp. 196-317.

According to one interpretation of ash-Shāfiᶜī's legal theory, he placed such exacting restrictions upon 'ijmāᶜ that the practical effect was to limit his sources of law to just the Qur'ān and musnad ḥadīth and analogical reasoning made on the basis of them; see Ahmad Hasan, The Early Development of Islamic Jurisprudence (Islamabad: Islamic Research Institute, 1970), p. 56.

set forth in appendix 1--on the acceptance of isolated ḥadīth, thereby rejecting as invalid ash-Shāfi^{c}ī's very distinctive principle of making isolated ḥadīth with sound 'isnād's a valid, independent source of Islamic law. Like all other schools, Ḥanafī legal theory regarded the Qur'ān as a major source of law; nevertheless, Ḥanafī principles regarding the manner of interpreting the Qur'ān are quite distinctive in some regards; for example, it regards general [^{c}āmm] statements to be definitive [qaṭ^{c}ī]. Although Ḥanafī theory makes extensive use of qiyās, the Ḥanafī concept of qiyās, nevertheless, differs from the Shāfi^{c}ī concept; Ḥanafī qiyās, for example, is often based on established precepts of law and not specific legal texts. Ḥanafī theory continued to give a much more extensive role to local customs [al-^{c}urf wa 'l-^{c}ādah] in the application of the law. Finally, Ḥanafī theory continued to rely heavily upon its conception of istiḥsān [a type of equity], despite ash-Shāfi^{c}ī's arguments that istiḥsān was arbitrary.[1]

Mālikī legal theory, like Ḥanafī theory, never accepted ash-Shāfi^{c}ī's principle that isolated musnad ḥadīth with sound 'isnād's were a valid, independent source of law.

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[1]Each of these points is treated briefly as a matter of comparison in the appropriate parts of this chapter. However, for further references see 'Abū Zahrah, Mālik, p. 451, and for a good introductory treatment of Ḥanafī legal theory, based on the legal opinions of 'Abū Ḥanīfah and the theories of prominent Ḥanafī legal theorists, see idem, 'Abū Ḥanīfah: Ḥayātuhū wa ^{c}Aṣruhū, Ārā'uhū wa Fiqhuhū (Egypt: Dār al-Fikr al-^{c}Arabī, 1955), pp. 232-358.

Like Ḥanafī theory, Mālikī legal theory continued to place restrictions upon the use of isolated ḥadīth, although the restrictions themselves were not the same, especially the stipulation that isolated ḥadīth not be contrary to Madīnan ᶜamal. Like Ḥanafī legal theory, it regarded mursal ḥadīth and the āthār and fatwā's of prominent Companions to be legitimate sources of law, although here too Mālikī legal theory had restrictions of its own. Furthermore, Mālikī legal theory continued to regard as valid its very distinctive non-textual source of law, the ᶜamal of Madīnah, against which it interpreted and evaluated the textual sources. Mālik also made use of qiyās; however, the concept of qiyās in Mālikī legal theory is notably different than the Shāfiᶜī concept. Like 'Abū Ḥanīfah, Mālik tends to make qiyās on the basis of established precepts of law and not specific legal texts in ḥadīth or other textual sources. Mālik occasionally rejects isolated ḥadīth on the basis of qiyās, and, furthermore, it appears that Mālik like later Mālikī legal theorists regarded it as valid to make qiyās on the basis of the deductions of earlier examples of qiyās, without going back to the original example.

Istiḥsān is also a very common part of Mālik's legal reasoning and a fundamental part of later Mālikī legal theory. As will be seen, however, the Mālikī concept of istiḥsān appears to differ significantly from the Ḥanafī. Mālik gave an extensive role to local customs in the application of

the law, an even more extensive role, perhaps, than 'Abū Ḥanīfah gave them. Finally, Mālik subscribes to the principles of sadd adh-dharā'i^{c} and al-maṣāliḥ al-mursalah, which distinguishes his legal reasoning notably from that of 'Abū Ḥanīfah and ash-Shāfi^{c}ī, although--as I point out in the discussion on istiḥsān--'Abū Ḥanīfah's concept of istiḥsān aḍ-ḍarūrah [istiḥsān made on the basis of necessity] may be cognate to al-maṣāliḥ al-mursalah.[1]

Ḥanbalī legal theory, which developed after ash-Shāfi^{c}ī, is much like Shāfi^{c}ī legal theory in its emphasis upon following the apparent [ẓāhir] meaning of the textual sources of Islamic law. Like Shāfi^{c}ī legal theory, it accepts the isolated musnad ḥadīth with sound 'isnād as a valid, independent source of law. However, Ḥanbalī legal theory goes beyond Shāfi^{c}ī theory in regarding more textual sources of law to be valid than any other sunnī school. It accepts musnad and mursal ḥadīth, ḥadīth with sound 'isnād's and some ḥadīth with 'isnād's that are less than sound. Furthermore, Ḥanbalī legal theory accepts the āthār and fatwā's of the Companions as a valid source of law; however, to each of these textual sources, Ḥanbalī legal theory assigns var-

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[1]These points are discussed in the appropriate parts of this chapter and the chapter pertaining to Mālik's conception of ^{c}amal. For other references see 'Abū Zahrah, Mālik, p. 451. This work is one of the most useful and comprehensive modern studies on Mālik and his legal reasoning. 'Abū Zahrah bases his analyses on Mālik's legal opinions as set forth in the Muwaṭṭa' and Mudawwanah and on the writings of prominent Mālikī legal theorists; see ibid., pp. 254-430.

ious stipulations and degrees of authority. Ḥanbalī legal theory also regards qiyās to be valid; however, because of the numerous textual sources that it accepts and because of its stipulation that qiyās not be resorted to except in the absence of an appropriate legal text, Ḥanbalī legal theory makes less use of qiyās than the other schools. Ḥanbalī legal theory also subscribes to a type of istiḥsān and to al-maṣāliḥ al-mursalah, although it does not conceive of them in exactly the same manner as the Ḥanafīs and Mālikīs. Finally, Ḥanbalī legal theory, like Mālikī, subscribes to sadd adh-dharā'i^{c} and is among the most rigorous of the four schools in its prohibition of legal fictions [ḥiyal]. It is also worthy of note that Ḥanbalī legal theory subscribes to some types of Madīnan ^{c}amal.[1]

Thus, there are significant differences in the legal theories of each of the four major sunnī schools of law. It should be kept in mind, furthermore, that the differences to which I have alluded here briefly are only a few of the most elemental differences. For even when schools share a common source of law--such as the Qur'ān--they differ on numerous points regarding its interpretation and use, such

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[1]In addition to my discussion of these points in appropriate parts of this chapter, see ^{c}Abd-Allāh ibn ^{c}Abd-al-Muḥsin at-Turkī, 'Uṣūl Madhhab al-'Imām 'Aḥmad ibn Ḥanbal: Dirāsah 'Uṣūlīyah Muqārinah (Cairo: Maṭba^{c}at Jāmi^{c}at ^{c}Ain Shams, 1394/1974), pp. 573, 576, 123, 255, 274-275, 289, 395-396, 430, 461, 515, 558-561; and 'Abū Zahrah, Ibn Ḥanbal: Ḥayātuhū wa ^{c}Aṣruhū, Ārā'uhū wa Fiqhuhū (Egypt: Dār al-Fikr al-^{c}Arabī, n.d.), pp. 207-332.

as the questions of what constitutes a command and a prohibition; how abrogation [an-naskh] is established; whether or not general [ᶜāmm] statements are conjectural [ẓannī] or definitive [qaṭᶜī]; what other sources of law may be used to render general statements specific [mukhaṣṣaṣ]; and so forth.

I have indicated that there are sources of law and principles of legal reasoning that some of the sunnī schools accept and others of them do not. Regarding those sources that they all accept, each school agrees, for example, on the definition of what the Qur'ān is. However, when we consider other sources of law and principles of legal reasoning--ḥadīth, āthār, 'ijmāᶜ, qiyās, istiḥsān, and so forth--we find differences in definitions, not to mention differences regarding interpretation, application, and authoritativeness.

Hence, for the proper study of Islamic law, it is necessary not only to identify the sources of law and modes of legal reasoning to which each school subscribes but to make also a detailed and comprehensive assessment of the definition, the content, the modes of interpretation and application, and the degrees of authoritativeness that pertain to each of those elements of legal theory. To describe a school's legal theory only by stating what it regards the sources of law and basic principles of legal reasoning to be, without such detailed analysis, is something like describing a language only as consisting of verbs, nouns, pronouns, adjec-

tives, adverbs, prepositions, conjunctions, and interjections without showing what those elements of speech are and how they work with each other.

In view of these differences between schools and the consideration that there was no "classical" theory of Islamic law, I believe that the proper approach to the study of the formative period of Islamic law requires the detailed and exhaustive analysis of the objective data constituted by the legal opinions of the early fuqahā' according to a methodology similar to the one I have attempted to follow in this dissertation. The body of such opinions is vast and immensely promising, if analyzed accurately and systematically. It can yield answers to the most fundamental questions pertaining not only to the emergence of the major schools but also to the development of early Islamic intellectual history in general. For Islamic law developed in the midst of that intellectual history and, in some regards, must have been at the very center of its development.

The history of the emergence of the major schools lends itself especially well to the methodological approach I have set forth in this dissertation. Each of these schools has an enormous volume of early legal opinions, and each has well-developed traditions of legal theory that attempt to explain them. But careful examination of the emergence of the major schools would surely give much insight into the legal reasoning of those early fuqahā'--like al-Laith

ibn Sa^{c}d, al-'Awzā^{c}ī, Sufyān ath-Thawrī, Ibn 'Abī Lailā,[1] aṭ-Ṭabarī, and so forth--many of whose legal opinions have been preserved but around whom no major schools or traditions of legal theory developed.[2] My objective in this dissertation has been to initiate such an analysis of the emergence of the Mālikī school.

Some General Observations about Mālikī Legal Theory

The intricacy of Mālik's legal reasoning

Mālik based his legal reasoning on a wide variety of sources and principles of law: the ^{c}amal of Madīnah, musnad and mursal ḥadīth, istiḥsān, sadd adh-dharā'i^{c}, al-maṣāliḥ al-mursalah, and so forth. He appears to have subscribed to more sources and principles of law, in fact, than any of the fuqahā' of the other major schools, with the possible exception of 'Aḥmad ibn Ḥanbal,[3] who, although

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[1]Muḥammad ibn ^{c}Abd-ar-Raḥmān IBN 'ABĪ LAILĀ (74-148/693-765) was a Kūfan faqīh of considerable importance in the early period and presided as qāḍī for thirty-three years during the 'Umayyad and ^{c}Abbāsid periods. His opinions ceased to be regarded as authoritative, however, shortly after the passing away of his generation; Sezgin, 1:518.

[2]For data on these persons, see above: al-Laith (p.83, note 5), al-'Awzā^{c}ī (p. 78 , note 1), ath-Thawrī (p.77 , note 1), and aṭ-Ṭabarī (p. 93 , note 2).

[3]'AḤMAD ibn Muḥammad IBN ḤANBAL (164-241/780-855) was born in Baghdād, where he began his study of the Arabic language and ḥadīth. Thereafter he began his extensive travels to centers of Islamic learning in that age, travelling even to the Yaman, where he studied under the famous Yamanī muḥaddith ^{c}Abd-ar-Razzāq ibn Hammām (126-211/744-827). He

he defined principles like istiḥsān and al-maṣāliḥ al-mursalah differently than Mālik and put greater restrictions upon their use, drew upon a greater number of textual sources of law than the fuqahā' of any of the other major sunnī schools.[1]

The variety of the sources and principles of law to which Mālik subscribes adds a considerable degree of intricacy to his legal reasoning in specific cases, especially in light of the consideration that Mālik often arrives at legal judgments by reasoning that draws on combinations of different sources and principles of law.[2] To cite an example of this which is not especially intricate, Mālik holds to the precept that Muslim men and women are permissible to each other in marriage, unless prohibited by certain well-established restrictions such as close ties of kinship. Furthermore, he holds that valid contracts of marriage carry

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also studied under 'Abū Yūsuf and ash-Shāfiᶜī, under whom he studied law and legal theory. His teacher Sufyān ibn ᶜUyainah, however, seems to have had an especially great influence upon him. In addition to being the founder of the Ḥanbalī school of law, the fourth major sunnī school, 'Aḥmad ibn Ḥanbal was quite significant in the general intellectual history of the early period, especially regarding his opposition to muᶜtazilī and other types of speculative kalām [theology], the speculations of some early ṣūfī's like al-Muḥāsibī, and so forth; see Sezgin, 1:502-503 and van Ess, pp. 9-10.

[1]Cf. at-Turkī, p. 576 and 'Abū Zahrah, Mālik, p. 451.

[2]'Abū Zahrah, Mālik, p. 320.

the extension of certain rights with them, such as mutual rights of the marriage partners to inherit set proportions of each other's estates. These precepts are derived from the various textual and non-textual sources of law to which Mālik subscribes. Nevertheless, should a man marry a woman who is otherwise permissible to him in marriage, while she is seriously ill, Mālik will qualify these general precepts in the light of his principle of sadd adh-dharā'i[c]. Because of the special circumstances of this marriage, Mālik holds that there is sufficient cause to suspect that the man's motive in marriage has been to inherit a husband's sizeable portion of the ailing woman's estate. Hence, Mālik rules that the contract of marriage is valid and the ailing woman must receive her dowry in full. But should she die during the course of the illness during which she was married, her new husband will receive no share in the inheritance of her estate whatsoever.[1]

Because of this potential intricacy in Mālik's legal reasoning that results from the number of sources and principles of law to which he subscribes and his manner of applying them in combination with each other, the researcher must exercise caution when attempting to elaborate what Mālik's reasoning was in given matters. From the limited standpoint of only some of these sources and principles or from the standpoint of non-Mālikī legal theory, for example,

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[1]Mudawwanah, 2:186 (5).

many of the conclusions that Mālik reaches would appear arbitrary or haphazard, especially examples that are not as forthright as the one I have just cited. Viewed from the standpoint of Mālik's overall legal reasoning, however, the same conclusions may appear quite consistent and predictable.

Hence, it is necessary that the researcher have a sufficiently good feeling for the overall legal reasoning that Mālik uses--and this would apply to the study of any faqīh--before attempting to analyze specific instances of the application of that reasoning. For that reason, I have attempted to present in this chapter a general overview of what I regard to be some of the most important fundamental principles of Mālik's legal thought.

Because of such potential intricacies in legal reasoning, it seems to me, furthermore, that the researcher must be especially cautious in drawing conclusions about the reasoning of any of the early fuqahā' and qāḍī's when, as is so often the case, their opinions and judgments are set forth with no clear indications or explanations of the reasoning behind them. Surely, it would be weak methodology to assume that these fuqahā' and qāḍī's arrived at decisions on an arbitrary ad hoc basis without any consistent, predictable reasoning merely because no explicit indication is given of such reasoning. That might prove to be no different than assuming that a physician has no consistent and predictable reasoning behind the various prescriptions he

gives his patients because his reasoning is not set forth on the prescriptions.

As in the case of Mālik, one must hypothesize an overall pattern of reasoning for such fuqahā' and qāḍī's, and one must also have a feeling for the special complexities that may pertain to any given case, before being able to evaluate specific judgments and opinions. Similarly, to return to the metaphor of a physician, one would have to understand a physician's overall theory of medicine and the potential complexities of a patient's case, before being able to conclude whether the physician's prescription was inconsistent with his theory of medicine or ill-advised for his patient. It is to be expected that some fuqahā' and qāḍī's of the early period, like other human beings, were guilty of arriving at opinions that were arbitrary and inconsistent with their other opinions. It is not possible, however, to discover such arbitrariness or inconsistency, I believe, until after having attempted to posit patterns of legal thought and the various possibilities of specific cases.

Furthermore, because of such potential intricacies in legal thought, those legal opinions of a faqīh or qāḍī that are set forth with some indication of the reasoning behind them are of special value to the researcher. Even they, however, may not be sufficient in themselves to construct the overall pattern of that faqīh or qāḍī's legal

reasoning. In those early legal works, for example, the general characteristic of which is not to present such explanations, it is possible that instances of explanation are not representative of the more fundamental principles of that person's reasoning. Rather it may be that, because the explained opinions are somewhat unusual or peripheral, the reasoning behind them was not held to be sufficiently obvious. Furthermore, in keeping with the laconic style of many of the early works of law, one must also bear in mind that the explanations given to specific opinions and judgments may be far from complete, setting forth perhaps only limited aspects of the faqīh or qāḍī's reasoning in the matter.

For reasons like these I believe that it is best to study the opinions of the major fuqahā' of the early period in the light of the more comprehensive hypotheses of the legal theorists of their schools. From the results of such analyses it may be possible to construct suitable hypotheses to explain and evaluate the more uncommunicative opinions of those early fuqahā' around whose opinions no schools of legal theory developed.

Finally, in light of the complexities of the data with which one is required to analyze the legal reasoning of the early fuqahā', it is advisable,before methodologically sound and thorough studies of the data have been completed, that modern researchers adopt the posture that they do not

yet know what the reasoning behind the more uncommunicative data was. For to say that it was arbitrary and inconsistant or, for that matter, that it was carefully reasoned and consistent implies that that reasoning has been discovered and understood.

Mālik's manner of elaborating
the full scope of legal precepts

Another preliminary observation about Mālik's legal reasoning that pertains to the multiplicity of the sources and principles of law to which he subscribes--and especially the non-textual source of Madīnan ᶜamal--is that Mālik takes care in the Muwaṭṭa' and Mudawwanah to elaborate the full scope of the legal precepts to which he subscribes. That is, he outlines important implications and specific restrictions and limitations that apply to those precepts but that can be arrived at only by considering them in the light of Mālik's multiple sources and principles of law.

For example, Mālik accepts an isolated ḥadīth that prohibits that date harvests be sold before the dates of that year's crop have appeared and begun to redden in the palm trees [i.e., after 'izhā']. Once the crop has begun to redden, however, the ḥadīth permits that the crop be sold in advance on the condition that it be harvested as fresh, ripe dates [busr and ruṭab] but not as dried dates [tamr].

Mālik elaborates upon what the precept is to which

this ḥadīth pertains and of which it is a reflection. His elaboration, however, is based primarily upon the non-textual source of ᶜamal, which provides details and insights that are not in the text. The prohibition set forth in this ḥadīth, Mālik holds, was meant to pertain to those date oases that do not produce annual harvests predictably, such as those small or isolated oases that produce harvests some years but fail to produce during others. Once the year's crop of such oases has begun to redden in the palm trees it is permissible to make a contract to purchase the harvest as fresh ripe dates, because it is clear that the trees will produce that year and the time required to elapse between the reddening of the dates and harvesting them as fresh ripe dates is relatively short, generally about a week or a little longer. Thus, Mālik continues, there is little likelihood that the harvest will perish or be destroyed during that short period. (This type of reasoning is istiḥsān, although used in this case to interpret a ḥadīth.) However, because the period required to elapse between the reddening of the dates in their palm trees and their being harvested as dried dates [tamr] is considerably longer, the hazard--Mālik explains--is still too great that the date harvest perish or be destroyed between the time of its first reddening and its being harvested as dried dates.

This is the scope of the ḥadīth as far as Mālik is concerned; he now continues to elaborate the precept itself,

of which the ḥadīth is only a partial reflection. The prohibition in this ḥadīth, Mālik continues, does not pertain to those well-established and well-watered oases or agricultural lands that have predictable harvests each year, like the large and fertile oasis of Madīnah or the Nile valley. In such agricultural regions, he explains, it is permissible not only to sell the date crop as dried dates at the time of the first reddening of the dates in their palm trees but it is permissible, furthermore, to sell one's crops over a year in advance, which has been customary in Madīnah.[1]

This type of elaboration, which is characteristic of Mālik, has several important implications. First of all, the researcher must articulate the full scope of each precept before analyzing specific instances of the application of that precept. In the Muwaṭṭa', Mālik sets forth the scope of many precepts, especially those in connection with which he cites his various terms. However, he does not do this always, nor does he do it always with the same degree of detail. In the Mudawwanah, however, one must sometimes read extensively and in various chapters to be able to collect enough of Mālik's statements and opinions to construct the full scope of the precepts to which he subscribes. The citations set forth in the preceding example, for instance, were in three different places, although relatively close to each other.

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[1]Mudawwanah, 3:119 (24), 121 (15), 122 (1).

Mālik's manner of elaborating the full scope of precepts by reference to non-textual sources of law and other principles of legal reasoning also has implications that pertain to his assessment of the nature of textual sources of law. It implies that some textual sources--like the isolated ḥadīth in the preceding example--are only partial reflections of more general precepts to which they pertain, even though there is nothing in the isolated text to indicate that. Such textual sources would be insufficient independent sources to indicate the full scope of the precepts they reflect. If one were to attempt to elaborate the precept contained in such textual sources only on the basis of the information contained in them, one would not be likely to arrive at the same conclusion as Mālik regarding the precept to which they pertained. Since Mālik regarded his elaboration of such precepts to be authentic, he would have surely held that attempts to elaborate the law only on the basis of textual sources was likely in some cases to lead to serious distortion of the original content of the law. Such an interpretation of Mālik's attitude toward textual sources, while in keeping with his overall legal reasoning, is also supported by the biographical accounts of the caution he exercised toward ḥadīth.[1]

I believe it is also clear from Mālik's manner of elaborating precepts why he tended to perform qiyās on the

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[1]See above, pp. 76-85.

basis of precepts and not specific legal texts. When one extends the ruling contained in a precedent to an unprecedented matter, one has generalized the ruling of that precedent. One has assumed that that ruling was not intended to be applied only to that precedent and nothing more, for extension of legal rulings by analogy amounts to the generalization and universalization of those rulings. However, the generalization of the ruling contained in a precedent (or legal text) by analogical extension to unprecedented matters cannot be an accurate or authentic application of the precept behind the precedented ruling unless the precedent and the unprecedented matter are truly analogous. Furthermore, one cannot know that they are truly analogous until one has discerned the full scope of the precept behind the ruling contained in the precedent. One must know the full provisions and the specific limitations of that precept. Otherwise one cannot determine whether the ruling in the precedent reflects a general provision or prohibition or whether it reflects a specific limitation or permission. Without knowing the general provisions and specific limitations of the precept behind the ruling one cannot know why the ruling was applied in the precedent. Without such knowledge, one is unable to know whether or not similar unprecedented matters are truly analogous.

Therefore, to make <u>qiyās</u> on the basis of a legal text is to assume that the ruling in that text was meant

to be generalized and, furthermore, that the information provided in the textual sources is sufficient to establish the full scope of the precept that the rulings in those sources reflect. This is the assumption of ash-Shāfi^{c}ī, who holds that legal texts will be assumed to be general until there is textual proof of their having been rendered specific, that legal texts will be held to be unabrogated until their is textual proof of their abrogation, and who holds, furthermore, that the textual sources of law that he regards to be valid provide a complete statement of the scope of the precepts of the law.[1] It should also be pointed out that ash-Shāfi^{c}ī has rather elaborate methods of determining the full scope of precepts by careful analysis and cross-referencing of texts.

Nevertheless, Mālik's assumption about the legal implications of textual sources of law appears to be essentially the opposite of ash-Shāfi^{c}ī's. Mālik's assumption, as reflected by the manner in which he elaborates the full scope of precepts by reference to non-textual sources of law and various principles of legal reasoning and by his tendency to make qiyās on the basis of these elaborated precepts instead of specific legal texts, indicates that Mālik tends to regard rulings in texts to be specific or of limited

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[1]See Sobhi Rajab Mahmassani, Falsafat al-Tashrī^{c} fī al-Islām: The Philosophy of Jurisprudence in Islam, trans. Farhat Ziadeh (Leiden: E. J. Brill, 1961), p. 90.

application unless there is proof that they were intended to be general. Furthermore, Mālik would regard a text to be inapplicable (possibly abrogated) until there was proof that it was still applicable. Finally, since his major criterion for establishing proof in such cases is the non-textual source of Madīnan ᶜamal, it may be inferred that Mālik, quite unlike ash-Shāfiᶜī, would not have held that the valid textual sources of the law would be sufficient in all cases to establish the full scope of the precepts of the law. Rather, from Mālik's point of view, the full statement of the scope of the precepts of the law is provided by the combination of the textual and non-textual sources that he regarded to be valid.

To illustrate this further, Mālik cites a ḥadīth in the Muwaṭṭa' that contains only the information that the Prophet handed down a legal judgment on the basis of an oath and the testimony of a single witness. He supports the ḥadīth and indicates that it was not abrogated by citing two reports that indicate that prominent Successors, among them ᶜUmar ibn ᶜAbd-al-ᶜAzīz and Sulaimān ibn Yasār, regarded it as valid to make legal judgments on such a basis. These reports, however, add no information about what exactly is meant by the expression "making judgments on the basis of an oath and a single testimony", nor do they indicate whether legal judgments made on such a basis apply to all types of cases--criminal, marital, etc.--or just some

types of cases to the exclusion of others.

On the basis of Madīnan ᶜamal, Mālik explains in detail what is meant in the ḥadīth, namely, that the plaintiff [ṣāḥib al-ḥaqq] be required to take an oath affirming his allegation and then support his oath by the testimony of a single witness. (Ordinarily two witnesses would be required.) Mālik adds other details about what is to be done if the plaintiff refuses to take an oath. Then Mālik adds the very important limitation that the matter of ruling on the basis of the plaintiff's oath supported by a single testimony pertains exclusively to money matters [al-'amwāl] and never to criminal cases, matters of divorce and marriage, emancipation, theft, or libel.[1] In some of the most elaborate legal reasoning that Mālik sets forth in the Muwaṭṭa', he continues to try to remove any doubt about this matter's being restricted to money matters or about its being valid in the first place. Mālik has elaborated on the very ambiguous textual sources by reference to the non-textual source of ᶜamal and has indicated that the matter in question has a limited application and is not to be extended by analogy to any types of law other than that which pertains to money matters. This is a clear example of an instance where failure to elaborate the precept only partially reflected in textual sources by reference to non-textual sources might lead to serious distortion of the orginal precepts.

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[1]Muwaṭṭa', 2:721-722.

Another implication of Mālik's manner of elaborating the full scope of precepts is that it indicates, I believe, Mālik's intent to disclose the purpose of the law behind many of the precepts he elaborates. The first example is an illustration of this. Mālik makes it quite clear what the purpose of the law was in prohibiting the sale of the date harvests of certain types of oases in advance of the reddening of the dates in the palm trees. But one sees perhaps even clearer examples of this type of elaboration that reveals the purpose of the law in Mālik's application of the principles of sadd adh-dharā'i^{c}, istiḥsān, and al-maṣāliḥ al-mursalah.

The effect of Mālik's use of these principles of legal reasoning--as I hope to demonstrate in this chapter--is that they mark off the limitations of the wide provisions or prohibitions of general precepts of law. By doing this, these principles do not contradict or negate those general precepts, rather they clarify their full scope and indicate what the legal intent or the purpose of the law behind them must have been.

To give an illustration of this, Mālik holds to the precept that a woman must have the consent of her guardian for her marriage contract to be valid. Furthermore, Mālik holds that the father has especially strong rights as a guardian in determining whom his daughter shall marry, when she has never been married before, although Mālik refuses

to extend those same rights in full to other guardians in the absence of a father. For he holds that kinsmen other than the father are not as likely as he to have the girl's interest at heart.[1] Once, however, the case was brought before Mālik of a young girl, whose mother and father had been separated many years before. The girl had grown up in her mother's household, had now become very beautiful, and many excellent suitors of considerable wealth and prestige were seeking her hand in marriage. Her father, however--who was still technically her guardian--refused to let her marry anyone but a certain kinsman of his, who, according to the mother's description, had no wealth or particular merit. Mālik ruled that the father's rights as guardian had been superseded by his abuse of the office of the guardian, one of the chief purposes of which is to secure a marriage that is in his daughter's best interest. The general principle, Mālik states, is that "there is no legal validity to any action that brings harm to oneself or others" [lā ḍarar wa lā ḍirār]. Hence, the father is no longer to be regarded as the girl's guardian; the government [as-sulṭān] shall act as her guardian instead and see that she is married to one of the more worthy suitors.[2]

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[1]Mudawwanah, 2:5 (8). [2]Ibid., 2:144.

The Sources of This Chapter

I draw heavily in the following discussions of fundamental principles of Mālikī legal theory on secondary sources. I cite illustrations of these theories from the Muwaṭṭa' and Mudawwanah on occasions. These citations, however, are only illustrative and are not regarded as conclusive. For exhaustive citations from primary sources would be disproportionately hard to achieve in a study of this scope.

The theories presented in this chapter are hypotheses in terms of which I will account for certain aspects of Mālik's reasoning in the discussions pertaining to ᶜamal in the remainder of the dissertation. In some cases, the application of these hypotheses in those chapters on ᶜamal will give them considerably more conclusiveness than they have in this chapter as actual parts of Mālik's manner of legal reasoning.

The terms that are used in this chapter--such as naṣṣ [a conclusive legal text], istiḥsān, qiyās, and so forth--are not of primary importance. In some cases they may be used differently in various schools, and often there is no indication that Mālik ever used them. I have employed these terms only as a convenient means to identify the concepts for which they stand, according to my definition of them in this chapter. As I have pointed out in my dissussion of concepts and terms, it is the concepts which I regard to be of primary importance, while the terms

must necessarily be secondary.[1]

Finally, I have presented in this chapter only those fundamentals of Mālikī legal theory that I have had recourse to in explaining examples of Mālik's use of ᶜamal in the remainder of the dissertation. Hence, this chapter is only prefatory to the discussions of this dissertation and is hardly a complete statement of Mālikī legal theory. I hope, however, that it provides a sufficiently representative overview.

The Qur'ānic Text

The Classification of Legal Texts According to Their Ambiguity

Mālikī legal theorists apply the word "naṣṣ" [a manifest text] to legal texts that are completely unambiguous. Such texts set forth the precepts to which they pertain with absolute clarity and do not lend themselves to more than one interpretation.[2]

They apply the word "ẓāhir" [of apparent or obvious meaning] to legal texts that are not completely unambiguous but contain, nevertheless, a certain obvious meaning. But, since the obvious meaning of a ẓāhir text is not conclusive, that text lends itself to more than one interpretation.[3]

There is no disagreement among Mālikī legal theorists

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[1]See the discussion of concepts and terms above,

[2]Abū Zahrah, Mālik, p. 262. [3]Ibid.

that such a distinction exists in Mālik's legal reasoning between what they call the ẓāhir text and the naṣṣ. They concur, furthermore, that Mālik regarded the naṣṣ to take priority over the ẓāhir text whenever the two contradict each other, since the degree of conjecture in the ẓāhir text is greater.[1]

Regarding General Statements in the Qur'ān

It is also a point of consensus among Mālikī legal theorists that general [ᶜāmm] legal statements in the Qur'ān and in other accepted textual sources of law are of the category of ẓāhir statements. Hence, according to Mālikī legal theory general legal statements are regarded to be conjectural [ẓannī] and not definitive [qaṭᶜī].[2] Hence, a general legal statement pertains to all the particulars

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[1] 'Abū Zahrah, Mālik, p. 262. According to 'Abū Zahrah, ash-Shāfiᶜī makes no such distinction between his usages of the words "ẓāhir" and "naṣṣ" in his Risālah. 'Abū Zahrah contends further that such a distinction is not a part of ash-Shāfiᶜī's legal theory; ibid. Perhaps the reason for this, if accurate, is that ash-Shāfiᶜī regards ẓāhir texts to have the same authoritativeness as what the Mālikīs refer to as "naṣṣ".

[2] Ibid., pp. 264-265; Muṣṭafā 'Aḥmad az-Zarqā, Al-Fiqh al-'Islāmī fī Thawbihī 'l-Jadīd: Al-Madkhal al-Fiqhī al-ᶜĀmm, 3 vols. (Beirut: Dār al-Fikr, 1968), 1:137; and Muḥammad Maᶜrūf ad-Dawālībī, Al-Madkhal 'ilā ᶜIlm 'Uṣūl al-Fiqh (Beirut: Maṭbaᶜat Dār al-ᶜIlm li-'l-Malāyīn, 1385/1965), pp. 153-157.
Regarding the translations of "ẓannī" and "qaṭᶜī", Anderson renders them as "presumptively authoritative" and "wholly authoritative" respectively, which seems to convey well their meaning in Islamic legal theory; see Norman Anderson, Law Reform in the Muslim World (London: U. of London Press, 1976), p. 6.

that it implies only with a degree of conjecture, according to Mālikī legal theory; it is not a definitive universal statement.

The position of the Mālikī legal theorists regarding the authoritativeness of general statements in the Qur'ān is the opposite of Ḥanafī theory on the same question. According to Ḥanafī legal theory general statements in the Qur'ān and other legal texts of established authenticity are definitive; that is, they apply to all the particulars that they imply definitively and without conjecture.[1]

Regarding Specific Statements in the Qur'ān

The legal theorists of all the major sunnī schools agree, according to 'Abū Zahrah, that specific [khāṣṣ] statements--that is, statements that indicate specifically the persons to whom they apply--indicate definitively those persons to whom they apply. Specific statements in the Qur'ān and other textual sources of law of accepted validity are regarded to be definitive.[2]

From the standpoint of Mālikī legal theory, therefore,

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[1]Al-Kawtharī, p. 37, (He cites Ḥanafī works on legal theory that he believes have treated best the Ḥanafī conception of this question.); 'Abū Zahrah, Mālik, pp. 266-267. Cf. idem, 'Abū Ḥanīfah, pp. 245-268; az-Zarqā, 1:136-138; and ad-Dawālībī, pp. 153-160.

[2]'Abū Zahrah, Mālik, p. 268.

specific [khāṣṣ] statements take priority over general [ᶜāmm] statements as long as the source of the specific statement itself is not open to conjecture.[1] This stipulation, however, does not apply to Ḥanafī legal theory. For, since Ḥanafī theory regards general statements in the Qur'ān and other legal texts of established authenticity to be definitive, it also regards general and specific statements to be equally authoritative.[2]

The consequence of this Ḥanafī position on the authoritativeness of general and specific statements of well-established authenticity is reflected it its distinctive concept of abrogation [naskh]. According to Ḥanafī legal theory, a general statement in the Qur'ān or other texts of unquestioned authenticity can only be rendered specific [mukhaṣṣaṣ], when the legal text that indicates such specification [takhṣīṣ] is linked to it contextually or when there is some other indication that the two statements were revealed at the same time. For example, a legal statement in one verse may be general, but the following verse renders it specific. If, however, the general and specific statements are not linked together contextually or there is some other indication that they were revealed at different times, the last

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[1]'Abū Zahrah, Mālik, p. 268.

[2]Ibid., pp. 268-269. For a more comprehensive discussion, see idem, 'Abū Ḥanīfah, pp. 245-268.

of them to have been revealed is regarded as having abrogated the earlier statement.[1]

Furthermore, according to 'Abū Zahrah, Ḥanafī legal theory regards general statements to be definitive prior to their having been rendered specific but conjectural afterward. (The distinction here would appear to be between specific statements that are specific ab initio, which are regarded to be definitive, and those statements that are initially general but are then rendered specific, and, hence, are regarded to be conjectural. Perhaps, they are regarded to be conjectural because their initial generality has been demonstrated not to be conclusive.) Hence, according to the two early Ḥanafī legal theorists--ᶜĪsā ibn 'Abān and al-Karkhī[2]--once a general text has been rendered specific, 'Abū Ḥanīfah permits the full extent of its specification to be elaborated by means of qiyās, although he

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[1] 'Abū Zahrah, Mālik, pp. 268-269.

[2] ᶜĪSĀ IBN 'ABĀN ibn Ṣadaqah (d. 221/836) was a student of ash-Shaibānī and a qāḍī of Baṣrah during the last eleven years of his life. Ibn an-Nadīm cites five works of his. As-Sarakhsī (d. 483/1090), one of the most highly regarded Ḥanafī legal theorists, cites numerous quotations from ᶜĪsā ibn 'Abān in his famous 'Uṣūl. See Sezgin, 1:434.

'Abū 'l-Ḥasan ᶜUbaid-Allāh ibn al-Ḥusain AL-KARKHĪ (260-340/873-952) lived in Baghdād, where he learned Ḥanafī fiqh. He lived in poverty and was regarded as very pious. Later in his life he came to be regarded as the head of the Ḥanafī school. Manuscripts of his works on legal theory are still available. Al-Qudūrī (d. 428/1037), a notable Ḥanafī faqīh, regarded al-Karkhī's "Mukhtaṣar" to be among the most important works of the Ḥanafī school. "Al-Mukhtaṣar" also contains important information on the history of the Ḥanafī school. Sezgin, 1:444.

does not regard qiyās to be authoritative enough to render general texts specific independently.[1] Furthermore, although 'Abū Ḥanīfah does not regard isolated ḥadīth to be authoritative enough to abrogate independently general Qur'ānic statements or render them specific, once it has been established that a general statement in the Qur'ān is specific, 'Abū Ḥanīfah accepts isolated ḥadīth as a valid means of establishing the full scope of that specification.[2]

Regarding the Specification of General Statements

A further implication of the Mālikī and the Ḥanafī concepts regarding the authoritativeness of general statements in the Qur'ān and other legal texts of unquestioned authenticity is that, since Mālikī legal theory regards such statements to be conjectural, the number of ancillaries [qarā'in] that are regarded to be valid means of indicating specification [takhṣīṣ] are very numerous in Mālikī legal theory. In Ḥanafī legal theory, on the other hand, since general statements are regarded to be definitive, the number of ancillaries that can be used to indicate specification are relatively few, since only those ancillaries are regarded to be legitimate which are also definitive.[3]

Al-Qarāfī cites fifteen ancillaries according to which

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[1]'Abū Zahrah, Mālik, pp. 271-273. [2]Ibid.

[3]Ibid., pp. 269-270.

general statements in the Qur'ān may be rendered specific in Mālikī legal theory.[1] It is said to be part of the Mālikī concept of maṣlaḥah that general statements in the Qur'ān or other well-established legal texts are rendered specific on the basis of the consideration of maṣlaḥah. In other words, general texts may only be applied in their generality as long as that application does not obliterate the maṣlaḥah for which it was intended. Az-Zarqā believes that the Mālikī position in this matter reflects the theoretical position of the Mālikī school that the legal intent behind the directives of Islamic law is to bring about maṣlaḥah in this life and the next. Thus, it is against the legal intent of the law to continue to apply general precepts to circumstances where their application annuls the benefits they were intended for. He continues to point out that, the more conjectural the precept in question, the more strictly the criterion of maṣlaḥah is adhered to.[2]

Muṣṭafā az-Zarqā's position that Mālikī legal theory permits the specification of general statements on the basis of maṣlaḥah is supported firmly by Mālik's legal reasoning. As will be seen in the discussion of Mālik's application of istiḥsān, sadd adh-dharā'i^{c}, and al-maṣāliḥ al-mursalah, the essential characteristic of Mālik's application of these

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[1]In his Tanqīḥ al-Fuṣūl, cited by 'Abū Zahrah, Mālik, p. 270.

[2]Az-Zarqā, 1:136.

principles is precisely that he puts limits on the application of general precepts under certain circumstances because to apply the general precept under those circumstances would annul the maṣlaḥah intended by the precept or create a mafsadah [evil] that was unintended.[1]

It is important, however, to take note of the fact that even in Mālikī legal theory isolated ḥadīth are not sufficient independently to establish that a general statement in well-established legal texts is specific, even though Mālikīs regard general statements to be conjectural. In this regard Mālikī theory is somewhat like Ḥanafī, which also does not permit the Qur'ān to be rendered specific or abrogated by isolated ḥadīth independently. Furthermore, Mālikī legal theory differs on this point with Shāfi^{c}ī legal theory, which, although it regards general statements to be conjectural, regards the isolated ḥadīth to be authoritative enough to render general meanings of the Qur'ān specific.[2]

Mālikī legal theory differs considerably from Ḥanafī theory regarding isolated ḥadīth and the specification of general legal texts, however, in that Mālikī legal theory regards isolated ḥadīth as authentic indications of specification whenever those ḥadīth are in conformity to Madīnan

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[1]See below, pp. 245-280; cf. above, pp. 143-144.

[2]Abū Zahrah, Mālik, 271, 288-289; cf. ad-Dawālībī, pp. 153-157.

ᶜamal. In such cases, the indication of the isolated ḥadīth is regarded to be valid in Mālikī legal theory, even though the precept indicated by the ḥadīth may be contrary to analogy with other well-established precepts of law.[1] It is clear, however, that in such examples it is the non-textual source of Madīnan ᶜamal which is authoritative, while the isolated ḥadīth is regarded to be valid only because it is an ancillary to ᶜamal.

Finally, the numerous considerations in reference to which Mālik renders general texts specific is in keeping with what I have regarded to be a general implication of Mālik's legal reasoning that legal texts will be regarded as specific until their generality has been established, which seems to be supported by the manner in which Mālik elaborates upon the full scope of the precepts to which he subscribes.[2]

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[1]'Abū Zahrah, Mālik, pp. 288-289, 271, 305.

[2]See above, pp. 135-144.

Mursal Ḥadīth[1]

More than a third of the ḥadīth in the Muwaṭṭa' are mursal.[2] In accepting mursal ḥadīth as a valid source of law, Mālik is like Sa^cīd ibn al-Musayyab, ash-Sha^cbī,[3] 'Ib-

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[1]A mursal ḥadīth is a ḥadīth that does not have a complete 'isnād; it is opposed, therefore, to musnad ḥadīth, which have complete 'isnād's. Muḥaddith's and legal theorists define the mursal ḥadīth differently, however, as I illustrate below. In this dissertation I follow the definition of the legal theorists.

In the terminology of the muḥaddith's a mursal ḥadīth is one the 'isnād of which does not mention the name of the Companion of the Prophet from whom the ḥadīth was originally transmitted. According to this definition, a mursal ḥadīth has an 'isnād which cites the Prophet and then an older Successor, without mentioning the Companion from whom the older Successor heard the ḥadīth. There is disagreement about whether or not ḥadīth with 'isnād's like this that cite the Prophet and then a younger Successor are mursal, because the younger Successors received most of their ḥadīth from older Successors and very few from Companions. According to the terminology of the muḥaddith's, a ḥadīth with an 'isnād that does not mention one or more transmitters other than a Companion is called "munqaṭi^c" [cut off]; see at-Turkī, p. 289 and Yūsuf IBN ^cABD-AL-BARR, At-Tamhīd limā fī 'l-Muwaṭṭa' min al-Ma^cānī wa 'l-'Asānīd, ed. Muṣṭafā ibn 'Aḥmad al-^cAlawī & Muḥammad ^cAbd-al-Karīm al-Bakrī, 12 vols. (Ribat: al-Maṭba^cah al-Malakīyah, 1387/1967), 1:19-21.

In the terminology of legal theorists, however, the mursal ḥadīth is any ḥadīth with an incomplete 'isnād, whether it be a Companion, Successor, someone else, or numerous transmitters who are not mentioned; see at-Turkī, p. 289 and Muḥammad ibn ^cAbd-Allāh IBN TŪMART, Kitāb 'A^cazz Mā Yuṭlab: Mushtamil ^calā Jamī^c Ta^cālīq al-'Imām Muḥammad ibn Tūmart mimmā 'Amlāhu 'Amīr al-Mu'minīn ^cAbd-al-Mu'min ibn ^cAlī raḥimahumā 'Llāh Ta^cālā (Algiers: Maṭba^cat Pierre Fontana, 1321/1904), p. 53.

[2]Al-Kawtharī, p. 34; cf. Sezgin, 1:458.

[3]^cĀmir ibn Sharāḥīl ASH-SHA^cBĪ (19-103/640-721) was born in Kūfah and became one of its most notable muḥaddith's and fuqahā'. He also had extensive knowledge of the history

rāhīm an-Nakha^{c}ī,[1] al-Ḥasan al-Baṣrī, 'Abū Ḥanīfah, Sufyān ath-Thawrī, al-'Awzā^{c}ī, and other prominent fuqahā' of his generation and the generation before him who also regarded them as a valid source of law.[2] In fact, according to Ibn ^{c}Abd-al-Barr, aṭ-Ṭabarī held that there had been consensus among the Successors regarding the validity of using mursal ḥadīth and that none had rejected them absolutely until ash-Shāfi^{c}ī did so at the turn of the third/ninth century.[3]

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of the Prophet's military campaigns and of pre-Islamic poetry, extensive amounts of which ash-Sha^{c}bī transmitted. The 'Umayyad caliph ^{c}Abd-al-Malik sent ash-Sha^{c}bī as a special ambassador to the ruler of Byzantium. Later ^{c}Umar ibn ^{c}Abd-al-^{c}Azīz made him a qāḍī; Sezgin, 1:277.

[1]'IBRĀHĪM ibn Yazīd ibn Qais AN-NAKHA^{c}Ī (50-96/670-715), a Kūfan Successor, was one of the most important fuqahā' of the early period. He studied under older Successors and some Companions; Ḥammād ibn 'Abī Sulaimān (d. 120/738), who was 'Abū Ḥanīfah's most influential teacher, was one of 'Ibrāhīm's students. Sezgin, 1:403-404.

[2]See Ibn Tūmart, pp. 53-54; ^{c}Uthmān ibn ^{c}Umar IBN AL-ḤĀJIB, Mukhtaṣar al-Muntahā 'l-'Uṣūlī (Cairo: Maṭba^{c}at Kurdistān al-^{c}Ilmīyah, 1326/[1908]), p. 89; 'Abū Zahrah, Mālik, pp. 294-295; and al-Kawtharī, pp. 32-33, 36 (note 1). Al-Kawtharī claims that mursal ḥadīth make up almost half of the body of transmitted ḥadīth that constitute the sunnah of the Prophet practiced by the early Muslims; hence, he holds that rejection of mursal ḥadīth as a valid source of law had far-reaching effects; ibid.

[3]Ibn ^{c}Abd-al-Barr, At-Tamhīd, 1:4; cf. al-Kawtharī, pp. 36 (note 1), 32-33, who also quotes Ibn ^{c}Abd-al-Barr, al-Bājī, aṭ-Ṭabarī, 'Abū Dāwūd, and Ibn Rajab. Al-Kawtharī holds that al-Bukhārī and Muslim must not have rejected mursal ḥadīth absolutely, since their works contain some (ibid., pp. 34, 36 [note 1]). Although ash-Shāfi^{c}ī did regard the mursal ḥadīth which Mālik transmitted from Sa^{c}īd ibn al-Musayyab to be acceptable, he was not consistent in his rejection of other mursal ḥadīth, according to al-Kawtharī, who claims that ash-Shāfi^{c}ī's Musnad contains numerous mursal ḥadīth and that ash-Shāfi^{c}ī argues on the basis of mursal ḥadīth on certain questions; ibid., 33-34.

Like musnad ḥadīth, mursal ḥadīth are not accepted without any stipulations being put upon them. Mālikī legal theorists stipulate that, for a mursal ḥadīth to be acceptable, the one who transmits it must--like Mālik--have been a highly worthy [thiqah] transmitter who only transmitted ḥadīth from those who likewise were very worthy. In the case of those transmitters who transmit from weak and strong transmitters alike and take the matter of transmitting from weak transmitters lightly, one cannot accept the mursal ḥadīth they transmit, rather one must require of them that they enumerate each transmitter by name through whom the ḥadīth has come down.[1] According to al-Kawtharī, these are the same stipulations that 'Abū Ḥanīfah made upon the acceptance of mursal ḥadīth, and these stipulations were generally subscribed to--al-Kawtharī continues--among the Companions and Successors who accepted mursal ḥadīth.[2] One report has it that the famous Baṣran muḥaddith ᶜAlī ibn al-Madīnī[3] re-

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[1]Ibn ᶜAbd-al-Barr, At-Tamhīd, 1:17, 2, 6; see also Ibn al-Ḥājib, p. 89, Ibn Tūmart, pp. 53-54; 'Abū Zahrah, Mālik, p. 296; and al-Kawtharī, p. 32.

[2]Al-Kawtharī, p. 32.

[3]ᶜALĪ ibn ᶜAbd-Allāh ibn Jaᶜfar IBN AL-MADĪNĪ (161-234/777-849) was a famous Baṣran muḥaddith and historian of the generation of ash-Shāfiᶜī and 'Aḥmad ibn Ḥanbal; he was known as the ḥāfiẓ of ḥadīth of his generation. He was a copious writer and compiler of works. It is said that he compiled over two hundred compilations [muṣannaf's] of ḥadīth; he composed numerous other works as well on the biographical sciences of ḥadīth, Arab genealogy and tribes, and history. It is said that Ibn al-Madīnī's knowledge of the differences [ikhtilāf] in ḥadīth was superior to that of Ibn

garded Mālik's mursal ḥadīth to be valid by virtue of his having met this criterion; Ibn al-Madīnī is reported to have said:

> If Mālik reports a ḥadīth on the authority of "a man of the people of Madīnah" and you do not know who it is, [the ḥadīth] is authoritative [nevertheless]; for [Mālik] used to select carefully [those from whom he transmitted][kāna yantaqī].[1]

Ibn Tūmart[2] holds that the stipulation of worthiness in the transmitter of a mursal ḥadīth is as satisfactory as it would be in a musnad ḥadīth. For, Ibn Tūmart claims, if a transmitter is worthy, he will not transmit from those who are unworthy or about whom he knows nothing. If one cannot trust the transmitter of a mursal ḥadīth in such matters, neither can one trust the transmitter of a musnad ḥadīth to have reported faithfully and completely all from from whom he received the ḥadīth he transmits.[3] This argu-

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Ḥanbal. He also is said to have written a two volume work on the schools of law [madhāhib] of the muḥaddith's. Ziriklī, 5:118.

[1]ᶜIyāḍ, 1:141.

[2]Muḥammad ibn ᶜAbd-Allāh IBN TŪMART (485-524/1092-1130) was a contemporary of al-Qāḍī ᶜIyāḍ. He was a Moroccan Berber and the founder and an important spokesman of the political movement of the Muwaḥḥid's under ᶜAbd-al-Mu'min ibn ᶜAlī, which led to the foundation of the Mu'minid state. Ibn Tūmart grew up in his tribe, al-Maṣmūdah. Later he travelled to the East to make pilgrimage and study. He spent time in Iraq and then Makkah. Then he came to Egypt but was expelled. Ibn Tūmart was known as "al-Mahdī" and as "Mahdī 'l-Muwaḥḥidīn". Ziriklī, 7:104-105.

[3]Ibn Tūmart, pp. 53-54.

ment, though, does not take account of the fact that muḥaddith's often varied in their criteria by which they regarded others to be worthy. In the case of mursal ḥadīth one is required to rely upon the muḥaddith's judgment about those from whom he transmitted, whereas in the case of musnad ḥadīth one can evaluate the transmitters for oneself.

There is another consideration about the mursal ḥadīth, however, which needs further investigation. Ibn ᶜAbd-al-Barr states three reasons why muḥaddith's transmitted ḥadīth as mursal: 1) because they had received that ḥadīth from a large group [jamāᶜah] of various transmitters, which made it burdensome to enumerate all the channels of transmission; 2) because the muḥaddith forgot the transmitters, in which case it must be stipulated that he transmitted only from sound transmitters; and 3) because the muḥaddith in teaching the ḥadīth to his students found it unnecessarily distractive to give the 'isnād of every ḥadīth in full.[1]

I believe the first of these reasons is especially important, because if it had been a common practice in the early period for muḥaddith's to transmit ḥadīth that they had received through numerous channels as mursal ḥadīth, their mursal ḥadīth would often be much more well-known than those transmitted with complete 'isnād's. A large number of the mursal ḥadīth of this nature might be of the category

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[1]Ibn ᶜAbd-al-Barr, At-Tamhīd, 1:17.

of mutawātir ḥadīth or pertain to what 'Abū Yūsuf refers to as "as-sunnah al-maᶜrūfah".[1] Al-Ḥasan al-Baṣrī is reported to have said that whenever he had heard a ḥadīth from four or more Companions of the Prophet, he would transmit it as a mursal ḥadīth. According to another report, al-Ḥasan al-Baṣrī stated that whenever he transmitted a ḥadīth from one Companion directly, he had only heard that ḥadīth from that Companion. However, when he transmitted a ḥadīth as mursal he had heard it from very many [lit., seventy] Companions.[2]

Finally, mursal and musnad ḥadīth are of equal authority according to most Mālikī legal theorists, and similar stipulations apply to both. The transmitters cited in their 'isnād's must be acceptable, and, although a mursal ḥadīth cannot be rejected in Mālikī legal theory on the basis of a contrary musnad ḥadīth, Mālikīs reject mursal and musnad ḥadīth alike, regardless of their transmitters, when they are contrary to well-known types of Madīnan ᶜamal. This, according to Ibn ᶜAbd-al-Barr, is the opinion of the majority of Mālikīs. There have been some, he points out, however, who have claimed that mursal ḥadīth were more authoritative than musnad ḥadīth. According to him, their reasoning was that when a muḥaddith sets forth all his transmitters in a musnad ḥadīth it is an indication that he is not

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[1]Cf. 'Abū Zahrah, Mālik, p. 296; see above, p. 106.

[2]Cited by 'Abū Zahrah, Mālik, p. 296.

completely sure of the worthiness of each of the transmitters cited and, hence, has passed on the matter of evaluating them to the recipient of the ḥadīth. In the case of the mursal ḥadīth, however, they argue that the transmitter has been certain about the worthiness of his transmitters and, hence, has not felt it necessary to name them.[1] Ibn ᶜAbd-al-Barr disagrees with this reasoning. However, in light of the preceding speculation that transmitting ḥadīth as mursal in the early period might often have been an indication that those ḥadīth were well-known and had come down through numerous channels, one can conceive easily of how the theoretical position that mursal ḥadīth are more authoritative than musnad might have evolved originally.

The Āthār and Fatwā's of the Companions

One of the points of similarity between the Ḥanafī, Mālikī, and Ḥanbalī schools and of dissimilarity between them and the Shāfiᶜī school is the attitudes they take regarding the utility and authoritativeness of the āthār and fatwā's of the Prophet's Companions.[2] Mālik's belief in the

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[1]Ibn ᶜAbd-al-Barr, At-Tamhīd, 1:2-6.

[2]See 'Abū Zahrah, Mālik, pp. 312-315 and at-Turkī, pp. 395-396. According to 'Abū Zahrah's analysis of the Mālikī and Ḥanbalī schools, they regard the āthār and fatwā's to be more authoritative than any other sunnī school of law. Both of them regard the āthār and fatwā's of the Companions to be a potential source of the Prophetic sunnah. Similarly, according to the early Ḥanafī legal theorist al-Karkhī, 'Abū Ḥanīfah relies heavily upon āthār and the

authoritativeness of the āthār and fatwā's of the Companions is illustrated, as 'Abū Zahrah observes, in Mālik's letter to al-Laith ibn Sa^{c}d. In it Mālik describes the prominent Companions, especially those who became caliphs after the Prophet's death, in the following terms:

> Then there arose from among those who assumed authority after [the Prophet] those who of all the people of his community ['ummah] were the closest in following [the Prophet] on the basis of what had been revealed to them [through him]. Whenever they had knowledge of a matter, they put it into practice ['anfadhūhu], and when they did not have knowledge of a matter, they inquired [among themselves] concerning it. They would then follow that [opinion] of whatever they could find in the matter that was strongest ['aqwā] in terms of their ijtihād and the proximity of their era [to that of the Prophet]. If someone [among them] took issue with them and held another opinion that was even stronger, they would abandon their earlier position.[1]

What is especially important in this citation, I believe, is

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fatwā's of the Companions of the Prophet as a source of his sunnah. 'Abū Ḥanīfah, however, is said to have made the further stipulation that the āthār and fatwā's of the Companions are only a source of sunnah when the judgments they pertain to could not have been arrived at by means of qiyās. In such cases, 'Abū Ḥanīfah holds that the Companions must have derived their opinions directly from Prophetic authority. As for ash-Shāfi^{c}ī, he adheres to the 'ijmā^{c} of the Companions, but if there is disagreement among them on a matter, he follows those of their opinions that are closest to the musnad ḥadīth he accepts. Since ash-Shāfi^{c}ī does not regard the āthār and fatwā's of the Companions to be a valid independent source of sunnah, he will not follow them when they are contrary to acceptable musnad ḥadīth. See 'Abū Zahrah, Mālik, pp. 312-313.

[1]^{c}Iyāḍ, 1:34, cited by 'Abū Zahrah, Mālik, pp. 122-123, 308-309.

Mālik's conviction that the prominent Companions followed the Prophet's sunnah very closely and that their ijtihād had special value because of their knowledge of what the Prophet had taught and their proximity to the Prophet's life. Mālik also emphasizes that the Companions would follow those legal arguments in their ijtihād that appeared to them to be strongest and most sound.

For reasons such as these, both Mālik and 'Aḥmad ibn Ḥanbal regard the āthār and fatwā's of the Companions in all types of matters to be potential sources of sunnah and to be similar in that regard to ḥadīth.[1] 'Abū Zahrah cites an illustration of Mālik's use of a fatwā of the caliph ᶜUmar ibn al-Khaṭṭāb to establish the content of the Prophetic sunnah contrary to a ḥadīth on the same matter. Mālik cites a report in the Muwaṭṭa' according to which the Companions Saᶜd ibn 'Abī Waqqāṣ[2] and aḍ-Ḍaḥḥāk ibn Qais[3] discuss certain

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[1] 'Abū Zahrah, Mālik, p. 315.

[2] SAᶜD IBN 'ABĪ WAQQĀṢ Mālik az-Zuhrī (23bh-55/603-675) was one of the most famous Companions of the Prophet. He took part in the major battles of the Prophet's life and played a central role in the conquest of Iraq. Saᶜd settled fora while in Kūfah, took part in the planning of the city, and was appointed its governor by ᶜUmar ibn al-Khaṭṭāb, who also considered Saᶜd ibn 'Abī Waqqāṣ a potential candidate for the caliphate after his death. Saᶜd continued to be governor of Kūfah for a time under ᶜUthmān, who later removed him. Saᶜd returned to Madīnah toward the end of his life and died there. Ziriklī, 3:137-138.

[3] AḌ-ḌAḤḤĀK IBN QAIS ibn Khālid al-Fihrī (5-65/626-684) was one of the most prominent members of the clan of Banū Fihr. He took part in the conquest of Damascus and settled there afterwards. Aḍ-Ḍaḥḥāk was a close associate of Muᶜāwiyah ibn 'Abī Sufyān and was on his side during the

points relating to how the pilgrimage is supposed to be performed.[1] Aḍ-Ḍaḥḥāk states that anyone who performs the pilgrimage in a certain manner has no knowledge of what God has commanded. Sa^{c}d disagrees with him and replies: "What a bad thing it is you have said." Aḍ-Ḍaḥḥāk justifies himself by saying that ^{c}Umar ibn al-Khaṭṭāb had prohibited the pilgrimage to be done in the manner they are discussing, but Sa^{c}d replies to that that the Prophet himself performed pilgrimage once in that manner and that they performed it with him in that manner likewise.[2] In "Ikhtilāf Mālik" Mālik's proponent states that Mālik followed the position that aḍ-Ḍaḥḥāk took, on the grounds that ^{c}Umar ibn al-Khaṭṭāb had greater knowledge of the Prophet's <u>sunnah</u> than Sa^{c}d ibn 'Abī Waqqāṣ.[3]

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confrontation of Ṣiffīn. Mu^{c}āwiyah appointed aḍ-Ḍaḥḥāk to be the governor of Kūfah in 53/672, which was during the last years of the life of the former Kūfan governor Sa^{c}d ibn 'Abī Waqqāṣ. After the death of Ziyād ibn 'Abīh, aḍ-Ḍaḥḥāk was appointed governor of Damascus. He led the funeral prayers for Mu^{c}āwiyah. When the 'Umayyad ruler Mu^{c}āwiyah ibn Yazīd stepped down from office, aḍ-Ḍaḥḥāk gave his support to ^{c}Abd-Allāh ibn az-Zubair and refused to give allegiance to Marwān. Aḍ-Ḍaḥḥāk died on the battlefield. See Ziriklī, 3:309 and Ibn Ḥajar, 4:448-450.

[1]According to az-Zurqānī (1055-1122/1645-1710) this discussion took place in 44/665 during the first pilgrimage that Mu^{c}āwiyah made after his caliphate had been established. Mālik's report states explicitly that aḍ-Ḍaḥḥāk was performing the pilgrimage with Mu^{c}āwiyah; Muḥammad ibn ^{c}Abd-al-Bāqī AZ-ZURQĀNĪ, <u>Sharḥ Muwaṭṭa' al-'Imām Mālik</u>, ed. 'Ibrāhīm ^{c}Aṭūwah ^{c}Iwaḍ, 5 vols. (Egypt: Maktabat al-Ḥalabī, 1381/1961), 3:69.

[2]<u>Muwaṭṭa'</u>, 1:344. [3]Cited by 'Abū Zahrah, <u>Mālik</u>, p. 315.

In this matter Mālik--as 'Abū Zahrah observes--has followed the fatwā of ᶜUmar ibn al-Khaṭṭāb as related by aḍ-Ḍaḥḥāk ibn Qais.[1] This fatwā of ᶜUmar ibn al-Khaṭṭāb takes priority over the ḥadīth of Saᶜd ibn 'Abī Waqqāṣ, indicating that, since Mālik regarded both ḥadīth and the āthār and fatwā's of the Companions to be sources of sunnah, Mālik does not necessarily give priority to a ḥadīth over an 'athar or fatwā of a Companion when they conflict with the ḥadīth.[2] Furthermore, since Saᶜd's report is a ḥadīth about the Prophet, we also see in this example the distinction referred to earlier between ḥadīth and sunnah.[3] For Mālik does not regard Saᶜd's ḥadīth as constituting sunnah, whereas he regards ᶜUmar's prohibition to be based on ᶜUmar's greater knowledge of the Prophet's sunnah. It might also be pointed out that Saᶜd's ḥadīth is a report of an action [ḥikāyat ḥāl], and such reports are regarded to be ambiguous in Mālikī legal theory.[4] Az-Zurqānī[5] explains that ᶜUmar's prohibition was based on his understanding that when the

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[1]'Abū Zahrah, Mālik, p. 315. [2]Ibid.

[3]See above, pp. 79-80.

[4]See below, pp. 188-194.

[5]Muḥammad ibn ᶜAbd-al-Bāqī AZ-ZURQĀNĪ (1055-1122/1645-1710) was a famous pre-modern Egyptian Mālikī scholar and was regarded by some as the last great Egyptian muḥaddith. He was born and died in Cairo and was a graduate of al-'Azhar University. Ziriklī, 7:55.

Prophet performed the pilgrimage after the manner that Sa^{c}d has reported, it was only because of the special circumstances of that year and was not intended to be the pattern for all future years. Az-Zurqānī also believes that ^{c}Umar supported his interpretation of the Prophetic sunnah in this manner by reference to a pertinent Qur'ānic verse,[1] which appears to support his position. Az-Zurqānī holds, furthermore, that aḍ-Ḍaḥḥāk's statement that whoever performs the pilgrimage in the manner supported by Sa^{c}d is ignorant of "what God has commanded" [i.e., in the Qur'ān] is a reference to ^{c}Umar ibn al-Khaṭṭāb's interpretation of that verse.[2]

'Abū Zahrah cites other examples from "Ikhtilāf Mālik" that illustrate that Mālik regards the āthār and fatwā's of the Companions to be an authoritative source of the Prophetic sunnah; he adds the clarification, however, that it is the āthār and fatwā's of prominent Companions--like 'Abū Bakr,[3] ^{c}Umar ibn al-Khaṭṭāb, and Zaid ibn Thābit[4]--that

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[1]Qur'ān, 2:196. [2]Zurqānī, 3:69-70.

[3]'ABŪ BAKR ^{c}Abd-Allāh ibn 'Abī Qaḥāfah ^{c}Uthmān ibn ^{c}Āmir at-Taimī, known as "AṢ-ṢIDDĪQ"[the exceedingly truthful one] (51 bh-13/573-634) was the first man to believe in the Prophet. He was one of the most prominent members of Quraish, was quite wealthy, and had great knowledge of the genealogy, history, and politics of the Arabs, by virtue of which the Arabs referred to him as "^{c}ālim Quraish" [the learned one of Quraish]. He became the first caliph in the year of the Prophet's death, 11/632 and ruled two years and three and a half months until his death. Under 'Abū Bakr, the Islamic state was firmly established in Arabia,and Syria and much of Iraq were conquered. Ziriklī, 4:237-238.

[4]ZAID IBN THĀBIT ibn aḍ-Ḍaḥḥāk al-'Anṣārī (11bh-45/

Mālik regards as authoritative, since these Companions spent long periods of time in intimate contact with the Prophet and, therefore, had excellent knowledge of the Prophet's sunnah.[1]

It should be pointed out in this regard that many of the prominent older Companions who were in intimate contact with the Prophet for many years and sometimes decades transmitted relatively few ḥadīth compared to the number of ḥadīth transmitted by younger Companions. Only 92 ḥadīth, for example, are traced back to Zaid ibn Thābit, 142 to 'Abū Bakr, 146 to ᶜUthmān, 537 to ᶜUmar, and 586 to ᶜAlī.[2] 5374 ḥadīth, on the other hand, are attributed to 'Abū Hurairah,[3] who became a Muslim only about four years before

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611-665) was born in Madīnah but grew up in Makkah, where he became a Muslim while still a young boy. He was orphaned at the age of six, when his father was killed, and made the hijrah to Madīnah at the age of eleven. Zaid ibn Thābit was very valuable to the Prophet and was highly regarded among the Companions for his intelligence. It is said that he learned to read Syriac at the Prophet's request in a very short time so that he could read official letters that came to the Prophet in that language; it is also reported that he learned to read the Torah in a short time also. Zaid could write and was one of the main scribes whom the Prophet used to record the Qur'ān. He played a central role in the compilation of the Qur'ān during the days of 'Abū Bakr and in the reproduction of that copy under ᶜUthmān. He had extensive knowledge of Islamic law and served as a qāḍī in Madīnah and gave fatwā's. Ziriklī, 3:95-96; Sezgin, 1:401-402.

[1]'Abū Zahrah, Mālik, pp. 317-318.

[2]Ziriklī, 3:95-96; 4:237-238; 4:371-372; 5:203-204; 5:107-108.

[3]'ABŪ HURAIRAH ᶜAbd-ar-Raḥmān ibn Ṣakhr (21bh-59/602-679) was brought up as an orphan and became a Muslim in the

the Prophet's death and hardly shared the same nearness and confidentiality with him as shared by 'Abū Bakr, ᶜUmar, ᶜUthmān, ᶜAlī, and other more prominent Companions.[1] Similarly, 2630 ḥadīth are attributed to the younger Companion ᶜAbd-Allāh ibn ᶜUmar, 2210 to the Prophet's young wife ᶜĀ'ishah,[2] and 1660 to ᶜAbd-Allāh ibn ᶜAbbās,[3] another younger Companion.[4]

In light of the relatively few ḥadīth transmitted from the older and more prominent Companions, the use of their āthār and fatwā's to establish the content of the Prophetic sunnah has special value. It enables the faqīh to have access to their knowledge which he would not have had to the

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year 7/628. He took great interest in learning ḥadīth and stayed close to the Prophet for that purpose. ᶜUmar later made 'Abū Hurairah governor of Baḥrain for a time but removed him as not being competent to rule. 'Abū Hurairah returned to Madīnah, where he spent most of the remainder of his life teaching and where he died. He was governor of Madīnah for a short time prior to the establishment of 'Umayyad rule. Ziriklī, 4:80-81.

[1]Ibid.; cf. Abbott, 2:66.

[2]ᶜĀ'ISHAH bint 'Abī Bakr ᶜAbd-Allāh ibn ᶜUthmān (9bh-58/613-678) was the daughter of 'Abū Bakr and became the Prophet's favorite wife. Like other wives of the Prophet, she is also referred to as "'Umm al-Mu'minīn" [mother of the believers]; the Prophet married her in the year 8/629. ᶜĀ'ishah is regarded as the most knowledgeable of Muslim women; she had extensive knowledge of Islamic law and other religious knowledge. Ziriklī, 4:5.

[3]ᶜABD-ALLĀH IBN ᶜABBĀS ibn ᶜAbd-al-Muṭṭalib (3bh-68/619-687) was one of the most important younger Companions and known for his extensive knowledge of Qur'ānic commentary, fiqh, and the poetry, genealogy, and history of the pre-Islamic Arabs. Ziriklī, 4:228-229.

[4]Ibid., 4:246, 5, 228-229; and Abbott, 2:66.

same extent if he had had to rely exclusively on the relatively few ḥadīth they transmitted.[1] Companions like the Prophet's lifelong friend 'Abū Bakr, for example, who remained one of the Prophet's chief confidants for the more than two decades of his Prophetic mission, who witnessed him institute the entirety of the law, and who were with him and often counselled him as he made decisions of the most fundamental importance, may be expected not only to have had more extensive knowledge of the content of the sunnah than younger, less prominent Companions but, more importantly, to have had also a better and more comprehensive understanding of the purpose behind it. Thus, ash-Shāṭibī claims that Mālik is regarded to be an 'imām in the sunnah by virtue of his close adherence to the fatwā's of the Prophet's Companions.[2]

Perhaps it should be clarified that, although Mālik regards the āthār of the Companions to be a source of the sunnah, he does not regard them always to be conclusively authoritative. It appears, rather, that he evaluates them in a manner similar to the way in which he evaluates ḥadīth. As in the case of ḥadīth, the ᶜamal of Madīnah is one of the main criteria in terms of which Mālik interprets āthār.

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[1]Cf. 'Abū Zahrah, Mālik, p. 311-313.

[2]Ash-Shāṭibī, Al-Muwāfaqāt, cited by 'Abū Zahrah, ibid., pp. 311-312.

Regarding the legal opinions of the Successors

According to 'Abū Zahrah, the legal method of 'Abū Ḥanīfah includes the study of the legal opinions of prominent Successors, although 'Abū Ḥanīfah does not feel bound to follow them when his ijtihād leads to conclusions contrary to theirs. 'Abū Zahrah holds that Mālik's position with regard to the authoritativeness of the legal opinions of the Successors is the same as 'Abū Ḥanīfah's.[1] Mālik does not regard the opinions of the Successors to be an independent source of the sunnah; the opinions of certain prominent Successors, however, like the Seven Fuqahā' of Madīnah, az-Zuhrī, Nāfi^{c}, and ^{c}Umar ibn ^{c}Abd-al-^{c}Azīz, have especially high standing with Mālik, as is illustrated by his numerous citations of their opinions in the Muwaṭṭa'.[2] The fact that Mālik feels at liberty to disagree with the opinions of these Successors, however, is borne out by the numerous instances in the Muwaṭṭa' in which Mālik cites their opinions and disagrees with them.[3]

Isolated Ḥadīth

One of the major points of difference between 'Abū Ḥanīfah and Mālik, on the one hand, and ash-Shāfi^{c}ī and 'Aḥmad ibn Ḥanbal, on the other, is the position they take on

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[1]'Abū Zahrah, Mālik, p. 320. [2]Cf. ibid., p. 318.

[3]See, for example, pp. 731-760, below.

the authoritativeness of isolated ḥadīth as a valid, independent source of Islamic law. Whereas ash-Shāfiᶜī and Ibn Ḥanbal regard them as authoritative,[1] neither 'Abū Ḥanīfah nor Mālik does, rather both of them regard isolated ḥadīth as probably the weakest and least authoritative of the sources and principles of law to which they subscribe. As will be seen in this discussion, both 'Abū Ḥanīfah and Mālik use isolated ḥadīth only when they are corroborated by other more firmly established and less conjectural sources of law to which they subscribe. Hence, for them, isolated ḥadīth can only be regarded as a dependent source of law or an ancillary to the other sources.

As 'Abū Zahrah points out, ash-Shāfiᶜī states explicitly in "Ikhtilāf Mālik" that Mālik often rejects isolated ḥadīth and that Mālik accepts the āthār of the Companions as an indication of the sunnah, which are major contentions of ash-Shāfiᶜī in that work against Mālik.[2] I have also indicated in my treatment of Mālik's biography the attitude that the biographical accounts of Mālik indicate that he had toward isolated and irregular ḥadīth.[3]

In some cases, no doubt, Mālik and other early fuqahā' who, like him, put great restrictions upon the use of iso-

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[1]See 'Abū Zahrah, Ash-Shāfiᶜī, pp. 236-243, and at-Turkī, p. 263, 274-276.

[2]'Abū Zahrah, Mālik, pp. 315, 317-318; below, pp. 348-353.

[3]See above, pp. 76-85.

lated ḥadīth regarded irregular isolated ḥadīth that they rejected to have been fabricated. 'Abū Yūsuf, for example, refers to a statement of the Prophet, which he regards to be authentic:

> Ḥadīth shall be divulged from me in great numbers. Whatever comes down to you from me and is in accordance with the Qur'ān is from me, but whatever comes down to you from me that contradicts [yukhālifu] the Qur'ān is not from me.[1]

In a statement attributed to Mālik in the "ᶜUtbīyah",[2] he is said to have regarded a certain ḥadīth to have been fabricated because of its irregularity.[3]

Nevertheless, there are numerous cases in which Mālik, 'Abū Yūsuf, and Ibn al-Qāsim clearly regard the isolated ḥadīth they reject to be defective for reasons other than having been fabricated. It is significant, for example, that the majority of the isolated ḥadīth in "Ikhtilāf Mālik" upon which ash-Shāfiᶜī builds his arguments and which Mālik had rejected are ḥadīth which Mālik himself had transmitted in the Muwaṭṭa' with impeccable 'isnād's. Hence, it appears that it is because of the meanings and legal implications of these ḥadīth that Mālik regards them to be irregular and not because he questions their formal authenticity.

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[1] 'Abū Yūsuf, pp. 24-25.

[2] As I have pointed out, some prominent early Mālikī fuqahā' have denied the authenticity of much of the contents of the "ᶜUtbīyah"; see above, pp. 118-119.

[3] Cited by ash-Shāṭibī, Al-Muwāfaqāt, 3:66-67.

Many of the expressions that Mālik and Ibn al-Qāsim use in speaking of the irregular, isolated ḥadīth they reject indicate that it is not necessarily their authenticity which they question. Mālik says, for example, "I do not know what the reality [ḥaqīqah] of this ḥadīth is."[1] Ibn al-Qāsim comments regarding an irregular ḥadīth, "We do not know what the proper explanation [tafsīr] of it is."[2] Mālik says, "This ḥadīth has come down to us,but so has that [namely, ᶜamal] which indicates its weakness [ḍaᶜf]."[3] Or he says, "This ḥadīth has come down to us, but ᶜamal is not in accordance with it."[4] In the context of one of the most elaborate statements in the Mudawwanah about isolated, irregular ḥadīth, Ibn al-Qāsim explains that many such ḥadīth are "not regarded to have been fabricated but also not regarded to be suitable for being put into practice" ["fa-baqiya ghair mukadhdhab bihī wa lā maᶜmūl bihī"].[5]

It is reported that the famous Madīnan faqīh Ibn al-Mājishūn (the report does not specify which one) was asked why they transmitted ḥadīth and then did not follow them. He answered, "So that it be known that we have rejected them while having knowledge of them."[6] Similarly, Mālik is reported to have said that there were people of knowledge among the Successors who would transmit ḥadīth or receive them from others but who would then say, "We are not ignorant of them,

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[1]Mudawwanah, 1:5 (8). [2]Ibid., 2:151 (28).

[3]Ibid., 1:98 (19). [4]Ibid., 1:164.

[5]Ibid., 2:151-152 (28). [6]ᶜIyāḍ, 1:66.

but the ᶜamal has been firmly established [maḍā] contrary to them."[1] It is reported that Mālik's teacher Rabīᶜah used to say regarding ᶜamal and isolated ḥadīth, "One thousand [transmitting] from one thousand is preferable to me than one [transmitting] from one, for 'one [transmitting] from one' would tear [yantaziᶜu] the sunnah right out of our hands."[2] Similarly, it is reported that the Madīnan qāḍī Muḥammad ibn 'Abī Bakr ibn Ḥazm--who was the son of the famous Madīnan faqīh, qāḍī, and governor 'Abū Bakr ibn Ḥazm[3] and was qāḍī of Madīnah around 118/736--used to hand down rulings consistent with Madīnan ᶜamal and contrary to some ḥadīth. His brother ᶜAbd-Allāh, who was also one of Mālik's teachers,[4] used to ask him why he had rejected a pertinent ḥadīth. Mālik reports that his brother would reply, "But what then of the ᶜamal;" Mālik explains that he meant by this that upon which there was consensus in Madīnah.[5]

'Abū Yūsuf's Siyar al-'Awzāᶜī contains numerous instances of advice to rely on the well-known sunnah and avoid irregular [shādhdh] ḥadīth. He says once, for example:

> Make the Qur'ān and the well-known sunnah [as-sunnah al-maᶜrūfah] your directing guide ['imāman qā'idan]. Follow that and judge on the basis of it [wa qis ᶜalaihī] whatever presents itself to you that has not been clarified for you in the Qur'ān and the sunnah.[6]

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[1]ᶜIyāḍ, 1:66. [2]Ibid. [3]See above, p. 57, note 1.

[4]See above, p. 57, note 4. [5]Wakīᶜ, 1:176.

[6]'Abū Yūsuf, p. 32.

And he says:

> Beware of irregular [shādhdh] ḥadīth and take care to follow [wa ᶜalaika bi . . . .] those ḥadīth which the community [al-jamāᶜah] is following, which the fuqahā' recognize [as valid] [yaᶜrifuhū], and which are in accordance with the Book and the sunnah. Judge [qis] matters on that basis. As for that which is contrary to the Qur'ān, it is not from the Prophet even if brought down by a transmission [riwāyah].[1]

Although in this example 'Abū Yūsuf indicates that he regards certain types of irregular ḥadīth not to be from the Prophet at all, he also indicates at times in Siyar al-'Awzāᶜī that he does not question the authenticity of some irregular ḥadīth but regards them to be misleading because they pertain to unique examples of the Prophet's behavior or commands or, for some other reason, are not normative. He accepts one ḥadīth of al-'Awzāᶜī as authentic but regards al-'Awzāᶜī's conclusion to be very mistaken:

> What the Messenger of God [ṣ] has said [in this ḥadīth] is just as he has said, and knowledge of what al-'Awzāᶜī has said pertaining to it has already reached us. But we regard it as irregular [shādhdh], and ḥadīth that are irregular are not to be followed.[2]

At several points in Siyar al-'Awzāᶜī, 'Abū Yūsuf stresses the great care that is required to draw proper conclusions from ḥadīth. Essentially, he repeats the following statement:

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[1]'Abū Yūsuf, pp. 30-31.

[2]Ibid., pp. 103-105; for similar examples of 'Abū Yūsuf's drawing attention to the special considerations behind irregular ḥadīth that make them unsuitable for further analogy, see ibid., pp. 85-87, 63-64, 134-135, 107-110.

> We have heard before what al-'Awzā^{c}ī has told us about God's Messenger. But the ḥadīth of God's Messenger have [diverse] meanings [ma^{c}ān], implications [wujūh], and interpretations, which only one whom God helps to that end can understand [yafham] and perceive [yubṣir].[1]

Ibn Tūmart sets forth some of the considerations that can make isolated ḥadīth conjectural and irregular and, hence, unsuitable as the bases of legal reasoning until they are supported or clarified by reference to other sources of law such as, he points out, Madīnan ^{c}amal.[2] Isolated ḥadīth, he contends, are liable to additions, deletions, the loss of memory [on the part of the transmitter], errors and mistakes [al-khaṭa' wa 'l-ghalaṭ], oversights [al-ghaflah], lies [al-kadhib], the retraction [of one's opinion] [ar-rujū^{c}], contradiction [with other ḥadīth][at-ta^{c}āruḍ], and interpolation [at-taḥrīf].[3]

Ash-Shāṭibī holds that authentic statements that have been isolated from their contexts are ambiguous by nature, whether they be isolated ḥadīth or something else. Ambiguous statements, however, are essentially of two types, he believes: 1) those that are ambiguous in essence [al-mutashābih al-ḥaqīqī] and 2) those that are only incidentally ambiguous [al-mutashābih al-'iḍāfī]. The ambiguity of the first type, he believes, can never be removed; an example that he gives of a statement of that type are the Arabic

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[1]'Abū Yūsuf, p. 38; cf. ibid., pp. 63-64, 107-110, 14-15.
[2]Ibn Tūmart, pp. 51-52. [3]Ibid., p. 48.

letters like "Alif, Lām, Mīm"[1] that come at the beginning of some chapters of the Qur'ān. But the ambiguity of the second type can be removed once the statement is placed in its proper context in terms of the facts or the definitive precepts and principles that pertain to it. Ash-Shāṭibī believes that most ambiguous statements in the textual sources of Islamic law are of this second type.[2]

Ambiguous statements are open to numerous interpretations, which are often mutually contradictory and contradict other sources and principles of law as well. Once placed in proper context, however, this ambiguity is removed, and the intended interpretation becomes clear. Hence, according to ash-Shāṭibī, it is the duty of the mujtahid first to find the proper context in which an ambiguous statement belongs before beginning to draw conclusions from it. The mujtahid must find the specification [mukhaṣṣiṣ] that removes the ambiguity of the general [ᶜāmm] statement. He must discover the qualifier [muqayyid] that limits the unqualified [muṭlaq] statement. He must find the correct interpretation [al-mu'awwil] for the obvious [ẓāhir] statement. He must find the clarification [mubayyin] that elucidates the intended meaning of a clearly ambiguous [mujmal] statement, and, finally, the mujtahid must find the abrogation

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[1]Qur'ān, 2:1, 3:1, 29:1, 30:1, 31:1, 32:1.

[2]Ash-Shāṭibī, Al-Muwāfaqāt, 3:85-93.

[an-nāsikh] that pertains to the statement that was abrogated [mansūkh].[1]

Conclusions must not, however, be drawn on the basis of an isolated statement until it has been clarified in this manner and its ambiguity has been removed. Ash-Shāṭibī holds that one of the most fundamental characteristics of the Islamic heresies, whether those of extreme literalists or extreme esoterics, has been that they base their arguments on ambiguous statements taken out of their proper contexts, in the state in which they lead to confusion and contradiction.[2] Like other Mālikīs, ash-Shāṭibī holds that one of the surest criteria against which to remove the ambiguity of isolated legal statements and to place them in their proper context is that of ᶜamal:

> . . . For whenever a mujtahid contemplates a legal statement pertaining to a matter, he is required to look into [baḥth] many things, without which it would be unsound to put the statement into practice. Consideration of the ᶜamal [lit., 'aᶜmāl] of the early generations [al-mutaqaddimīn] removes these ambiguities from the statement decisively. It renders distinct that which is abrogating from that which has been abrogated; it provides a clarification [mubayyin] for that which is ambiguous [mujmal], and so forth. Thus, it is an immense help in the process of doing ijtihād. It is for this reason that Mālik ibn 'Anas and those who hold to his opinion have relied upon it.[3]

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:98, 76.

[2]Ibid., 3:76, 352, 90-91. [3]Ibid., 3:76.

Mālik's use of isolated ḥadīth by reference to other sources of law

The very notion of irregularity in isolated ḥadīth implies that those who regard them to be irregular have a criterion established by other sources and principles of law by which they determine what is regular (i.e., what is in conformity with that criterion) and what is irregular. 'Abū Yūsuf indicates in the citations I have just given that the Kūfan criterion was constituted by the Qur'ān, the well-known sunnah, and those ḥadīth that are recognized as valid by the fuqahā'. Several of the citations I have just given indicate that Mālik and other prominent Madīnan fuqahā' of his generation and before him looked to ᶜamal as a criterion. Later Mālikī legal theorists hold that isolated ḥadīth can provide definitive knowledge once they are supported by other sources and principles of law.[1] In fact when an isolated ḥadīth is supported by ᶜamal, as 'Abū Zahrah points out, Mālikīs no longer regard it to be isolated.[2]

The most explicit statement that I have found in the Muwaṭṭa' or Mudawwanah pertaining to Mālik's use of ᶜamal as a criterion against which to evaluate isolated ḥadīth is the following statement by Ibn al-Qāsim. 'Asad ibn al-Furāt has been questioning him about an 'athar that reports

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[1]See al-Qarāfī, 1:33; Ibn al-Ḥājib, p. 72; Ibn Tūmart, pp. 51-52; ᶜIyāḍ, 1:71; 'Abū Zahrah, Mālik, p. 303.

[2]'Abū Zahrah, Mālik, p. 305.

that ᶜĀ'ishah apparently acted once in the capacity of a guardian [walī] in the marriage of one of her kinsmen when the girl's father--the legal walī--was out of Madīnah travelling. Ibn al-Qāsim does not doubt the authenticity of the 'athar but tells 'Asad, "We do not know what the explanation [tafsīr] of it is, but believe that she appointed [wakkalat] someone else to act as her representative in contracting the marriage." But even so, 'Asad returns, the marriage would be irregular [fāsid] according to Mālik. Ibn al-Qāsim replies:

> This has come down [to us], and if this ḥadīth had been accompanied by ᶜamal such that that [practice] would have reached those whom we met during our lifetimes and from whom we received [our knowledge] and those whom they had met during their lifetimes, it would indeed be correct [ḥaqq] to follow it. But it is only like other ḥadīth that have not been accompanied by ᶜamal.
>
> [A ḥadīth] has been transmitted from the Prophet (ṣ), [for example], regarding the use of scent during the rites of pilgrimage, and also among that which has come down from him (ṣ) are [the words], "the fornicator ceases to be a believer when he fornicates" and ". . . when he commits theft", but God has revealed [in the Qur'ān] the punishment of the fornicator and the cutting off [of the thief's hand] on the basis of [his being] a believer. Other things have been transmitted from other Companions as well that have no support [lam yastanid] and are not strong [lam yaqwi] and regarding which the ᶜamal that was established is contrary. [Indeed], the generality of the people and of the Companions followed something contrary to them.
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> [Ḥadīth such as these] remained [in the state of being] neither rejected as fabricated [ghair mukadhdhab bihī] or put into practice. Rather ᶜamal was established in accordance with those [ḥadīth] that were accompanied by the practices ['aᶜmāl] [of the earlier generations] and which were followed by the Companions of the Prophet, who were his followers; and similarly the Successors followed them likewise without regarding that which had come down and been transmitted to have been fabricated or rejecting them outright ["min ghair takdhīb wa lā radd

limā jā'a wa ruwiya"].

Thus, that is passed over which has been passed over in ᶜamal ["fa-yutraku mā turika 'l-ᶜamal bihī"], and it is not regarded to have been fabricated ["wa lā yukadhdhabu bihī"]. But ᶜamal is practiced in accordance with that which has been practiced as ᶜamal, and it is regarded to be certainly authentic [wa yuṣaddaqu bihī].

[In this matter we have been discussing], the ᶜamal which is firmly established and is accompanied by the practices ['aᶜmāl] [of others] is the Prophet's statement (ṣ), "A woman shall only be married through a guardian" and the statement of ᶜUmar [ibn al-Khaṭṭāb], "A woman shall only be married through a guardian." Furthermore, ᶜUmar separated a husband and wife who had been married without a guardian.[1]

According to Mālikī legal theorists, Mālik also rejects isolated ḥadīth by reference to sources of law other than ᶜamal and by reference to definitively established precepts and principles of law. An illustration sometimes cited of this is Mālik's rejection of an irregular, isolated ḥadīth, which is regarded as formally authentic, that stipulates that one should wash a pot from which a dog takes a drink seven times before using it again and discard the contents. Ibn al-Qāsim says that he asked Mālik about this ḥadīth, and Mālik replied, "This ḥadīth has come down to us, but I do not know what the reality [ḥaqīqah] of it is." Ibn al-Qāsim indicates that Mālik regarded the domestic dog to be an exception on the basis of istiḥsān to other canines [sibāᶜ] that live in the wild, because such dogs live in man's company and are like members of the household ["ka'annahū min 'ahl al-bait"]. Thus, it would be severe to expect people to wash their pots seven times every time their dog takes

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[1]Mudawwanah, 2:151-152 (28).

a drink from them. Ibn al-Qāsim continues to say that Mālik also held that people should still consume the cooking butter [samn] or milk that might have been in the pot, even though their dog have eaten some of it while they were not attending. Mālik would say, "I regard it as preposterous [ᶜaẓīman] that one throw out to a dog sustenance that God has provided merely because the dog has licked it."[1] Ibn al-Qāsim had added earlier that Mālik had once been asked how he could hold this opinion concerning dogs and contrary opinions concerning other types of animals. Mālik would reply, "Each thing has its own standpoint [from which it must be considered]"["wa li-kulli shai' wajh"].[2]

According to the famous Andalusian Mālikī legal theorist 'Abū Bakr ibn al-ᶜArabī,[3] this opinion regarding the domestic dog is an example of Mālik giving priority to qiyās based upon definitive precepts of law over an isolated ḥadīth that is not supported by other definitive precepts or principles. The ḥadīth about washing the pot seven times and discarding its contents, Ibn al-ᶜArabī points out, is contrary to the Qur'ānic verse that declares the catch of

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[1]Mudawwanah, 1:5 (8). [2]Ibid., 1:4 (7).

[3]ABŪ BAKR Muḥammad ibn ᶜAbd-Allāh ibn Muḥammad IBN AL-ᶜARABĪ (468-543/1076-1148) was one of the greatest Mālikī fuqahā' and legal theorists. He was a ḥāfiẓ of ḥadīth and had extensive knowledge of all Islamic religious sciences and Arabic literature. He became the qāḍī of his native Seville. Ibn al-ᶜArabī wrote numerous valuable works on legal theory, fiqh, ḥadīth, Qur'ānic commentary, literature, and history. He died in Morocco near Fez, where he was buried. Many of his works are still available. Ziriklī, 7:106-107.

hunting dogs to be permissible for eating: ". . . and eat of the catch that they apprehend for you."[1] For hunting dogs seize the catch in their mouths and sometimes carry it in their mouths for a considerable time before the hunter gets it from them.[2]

'Abū Bakr ibn al-ᶜArabī also discusses the question of when it is permissible to accept an isolated ḥadīth that conflicts with a definitive precept [qāᶜidah] of Islamic law. 'Abū Ḥanīfah, he states, holds that it is not permissible to put such ḥadīth into practice, while ash-Shāfiᶜī holds that one is required to put them into practice. As for Mālik, Ibn al-ᶜArabī claims, he does not take either position, rather Mālik holds that the precept indicated by such a ḥadīth may be regarded as valid, despite the fact that it is contrary to a well-established precept, if there is another precept [qāᶜidah] of law that supports it. If there is no other precept to support it, however, the contrary isolated ḥadīth will be rejected.[3] It should be pointed out that 'Abū Zahrah believes, on the basis of statements of al-Karkhī and ᶜĪsā ibn 'Abān regarding 'Abū Ḥanīfah's legal theory, that 'Abū Bakr ibn al-ᶜArabī is mistaken about 'Abū Ḥanīfah's method of reasoning in this matter and that there is no essential difference between 'Abū Ḥanīfah and Mālik on it.[4]

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[1]Qur'ān, 5:4. [2]Cited by ash-Shāṭibī, Al-Muwāfaqāt, 3:24.

[3]Ibid. [4]'Abū Zahrah, Mālik, p. 303, note 1.

The Concept of ᶜUmūm al-Balwā

"ᶜUmūm al-balwā" [lit., general affliction or necessity] is a Ḥanafī legal term; it is especially useful, however, in analyzing Mālik's legal reasoning and especially his concept of ᶜamal. Ibn Rushd, for example, regards Mālik's conception and application of Madīnan ᶜamal to be cognate to 'Abū Ḥanīfah's concept of ᶜumūm al-balwā in rejecting isolated ḥadīth, as I will discuss later.[1]

Things are said to be of the nature of ᶜumūm al-balwā when they pertain to the members of society in general. They are matters of which people generally have definite need, that afflict people in general, and recur relatively frequently in peoples' lives. Hence, matters of the nature of ᶜumūm al-balwā are so commonplace or general that they can be expected to be part of the knowledge or experience of the majority.[2]

According to 'Abū Ḥanīfah, valid legal precepts that pertain to matters of the nature of ᶜumūm al-balwā must be parts of the well-known sunnah. Hence, when the only source of knowledge of precepts that pertain to ᶜumūm al-balwā is that of isolated ḥadīth, 'Abū Ḥanīfah regards the validity of those precepts to be suspect. Such isolated ḥadīth may have

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[1]See below, pp. 481-484.

[2]Al-Kawtharī, p. 37, note 1; cf. Zakī-ad-Dīn Shaᶜbān, 'Uṣūl al-Fiqh al-'Islāmī (Egypt: Maṭbaᶜat Dār at-Ta'līf, 1964-65), pp. 63-65.

been fabricated, abrogated, or may be for some other reason erroneous. For example, 'Abū Ḥanīfah regards criminal penalties [al-ḥudūd] and required acts of atonement [kaffārāt] to be of the nature of ᶜumūm al-balwā. Hence, he does not regard those penalties and required acts of atonement to be valid that are supported only by isolated ḥadīth.[1] (For other stipulations that 'Abū Ḥanīfah puts upon isolated ḥadīth, see appendix 1.)

According to 'Abū Zahrah, there is consensus among Mālikī legal theorists that isolated ḥadīth will be rejected when they are the only means of establishing precepts that pertain to matters of the nature of ᶜumūm al-balwā, such as the requirements pertaining to the five required daily prayers, the payment of zakāh--a savings tax required annually on the savings and earnings of those whose combined wealth exceeds a certain minimum--the performance of pilgrimage, and the required fasting during the ninth lunar month of Ramaḍān. 'Abū Zahrah also believes that Mālik's characteristic of rejecting ḥadīth that were unusual or which no one

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[1]Al-Kawtharī, p. 37, note 1; and Zakī-ad-Dīn Shaᶜbān, pp. 63-65.

Al-Qarāfī cites a comical illustration of the concept of ᶜumūm al-balwā and its applicability to rejecting isolated ḥadīth. If the mu'adhdhin [the one who makes the 'adhān (call to prayer)] falls from the minaret while calling the 'adhān for the Friday community prayers, one would expect to hear several reports of the incident. If one heard of the incident, however, only from a few, isolated reporters, one would doubt the validity of their report. See al-Qarāfī, 1:113.

was said to transmit but he, even though they had sound '*isnād*'s, is also similar to 'Abū Ḥanīfah's rejecting certain types of isolated *ḥadīth* that pertain to matters of *ᶜumūm al-balwā*.[1]

The statement attributed to Mālik in the "ᶜUtbīyah" which I referred to earlier[2] contains a fairly explicit articulation of application of what the Ḥanafīs call "ᶜumūm al-balwā" in the rejection of irregular, isolated *ḥadīth* and elucidates Mālik's concept of *ᶜamal*. The question is brought to Mālik about whether one should perform the so-called "sajdat ash-shukr" [prostration of gratitude] when something takes place which one likes. When Mālik states his position that one should not, the argument is brought forward that 'Abū Bakr, "according to what they say," performed the *sajdat ash-shukr* after his armies were given a vital victory. The questioner then asks Mālik if he has ever heard that. Mālik replies that he has not and that he regards it to be a lie which has been attributed to 'Abū Bakr falsely. He then adds:

> It is a type of misguidance ["hādhā min aḍ-ḍalāl"] that one hear something and then say, "This is something regarding which we have heard nothing to the contrary." . . . Many victories came to the Messenger of God (ṣ) and to the Muslims after him. Did you ever hear about a single one of them prostrating himself?
>
> When something like this comes down to you that has been part of the experience of the people and took place right in their midst ["mimmā kāna fī 'n-nās wa jarā ᶜalā 'aidīhim"] and yet you have heard nothing about it from

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[1]'Abū Zahrah, *Mālik*, p. 294. [2]See above, p. 172, n. 2.

> them, then let that be a sufficient indication for you ["fa-ᶜalaika bi-dhālik"]. For if it had taken place it would have been mentioned, because it is part of the experience of the people ['amr an-nās] which took place among them. So have you heard that anyone prostrated himself? Well, then, that is the 'ijmāᶜ.
>
> When something comes down to you that you do not recognize, put it aside ["'idhā jā'aka 'l-'amr lā taᶜrifuhū, fa-daᶜhū"].[1]

Ash-Shāṭibī comments on this statement that it is an explicit indication that it is the general ᶜamal of the many upon which one is to rely, whatever type it might be and to whatever it may pertain. No regard at all is to be paid, he continues, to the rarities and the unusual actions that have been handed down [qalā'il mā nuqila wa nawādir al-'afᶜāl] when this general and widespread ᶜamal contradicts them.[2]

One should keep in mind, however, in assessing Mālik's application of the concept of ᶜumūm al-balwā with regard to isolated ḥadīth that Madīnan ᶜamal plays a most important role for him in its application. For if an isolated ḥadīth is supported by Madīnan ᶜamal, it ceases to be regarded as isolated.[3] Rather the combination of Madīnan ᶜamal with an isolated ḥadīth, as I shall discuss later, makes for one of the most authoritative types of Madīnan ᶜamal, namely, what some legal theorists call "al-ᶜamal an-naqlī", which is regarded to be a definitive part of the Prophet's sunnah.[4]

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[1]Cited by ash-Shāṭibī, Al-Muwāfaqāt, 3:66-67.

[2]Ibid., 3:67. [3]See 'Abū Zahrah, Mālik, p. 305.

[4]See below, pp. 410-415.

Mālik's reliance upon Madīnan ᶜamal in his application of the concept of ᶜumūm al-balwā distinguishes him somewhat from 'Abū Ḥanīfah. It remains to be seen, however, whether or not 'Abū Ḥanīfah too--as al-Kawtharī affirms--relied upon the ᶜamal of Kūfah in evaluating ḥadīth and, if he did, to what extent.[1] But, even though there may not have been much conceptual difference between the methods of Mālik and 'Abū Ḥanīfah in this regard, they differed at least in that they relied upon the ᶜamal of different cities, which leads to differences on some specifics. Mālik, for example, regards guardianship to be a fundamental part of the marriage contract, as witnessed by Ibn al-Qāsim's lengthy citation, and the ḥadīth in this matter are supported by Madīnan ᶜamal.[2] 'Abū Ḥanīfah, however, does not regard guardianship to be a fundamental part of the marriage contract, because the stipulation of guardianship pertains to ᶜumūm al-balwā and has only been transmitted in isolated ḥadīth.[3]

The Ambiguity of Isolated Actions and Specific Rulings

The following concept pertaining to the ambiguity of isolated reports (in ḥadīth and āthār) of actions people did or of judgments that were handed down in special cases

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[1]Al-Kawtharī, p. 35. [2]See above, pp. 180-181.

[3]See Zakī-ad-Dīn Shaᶜbān, p. 64.

is a useful preliminary to analysis of Mālik's Muwaṭṭa'. For many of the controversial judgments of Mālik in the Muwaṭṭa' pertain to ḥadīth and āthār that come under the category of reports of isolated actions or special legal judgments.

Ash-Shāṭibī treats this concept at several points in his Muwāfaqāt and mentions at one point that this concept has been discussed by the legal theorists ['ahl al-'uṣūl] in general.[1] I have also found the concept in the works of some other Mālikī legal theorists, whom I shall mention in this discussion.

Ash-Shāṭibī refers to what I have called "isolated actions" as "ḥikāyāt al-'aḥwāl" [lit., the narrations of circumstances or situations], and he refers to specific legal decisions as "qaḍāyā 'l-'aᶜyān" [judgments for special cases or persons]. Reports of this nature are always ambiguous in isolation and, hence, ash-Shāṭibī reasons, cannot be valid legal proofs until they have been corroborated by reference to other sources and principles of law. Because of the nature of the ambiguity of such reports, ash-Shāṭibī observes, it is possible that they only appear to be contradictory to the continuous ᶜamal [al-ᶜamal al-mustamirr], whereas they are not in fact.[2]

It should also be noted that ash-Shāṭibī holds that

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:58. See also ibid., 1:118, 3:166, 4:58-59.

[2]Ibid., 3:58.

the ambiguity that pertains to reports of actions and specific legal decisions applies as well to certain types of statements ['aqwāl] in ḥadīth and āthār. These are statements that are parts of discussions, conversations, or other types of situational dialogue of the Prophet or his Companions. Statements of this type, ash-Shāṭibī holds, are not legal statements ['aqwāl], properly speaking. Rather they should be classified under reports of deeds and actions ['afᶜāl], and the ambiguity that pertains to isolated reports of actions pertains to them. Those statements are legal statements ['aqwāl], properly speaking, that define [tuᶜarrif] specific rulings or set down ordinances, precepts, commands, and prohibitions.[1] Furthermore, Drāz observes in his commentary upon the Muwāfaqāt that isolated types of ᶜamal and the ᶜamal of a limited number would be considered also to fall in this category of isolated actions and special judgments.[2]

Ibn Rushd refers to this concept on occasion in Bidāyat al-Mujtahid. For example, he alludes to it in his explanation of why Mālik does not regard it to be obligatory that one raise his hands and say "Allāhu 'akbar" [God is the greatest of all] more than once at the beginning of the required prayers, although Mālik cites ḥadīth in the Muwaṭṭa' that report that the Prophet was observed doing it

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 4:59.

[2]Drāz, ibid., 3:58, note 1.

several times during the course of the prayer. Mālik, according to Ibn Rushd, does not regard such reports of actions to be sufficient to indicate that those actions are obligatory until they are supported by an explicit proof [dalīl wāḍiḥ] by way of an authentic legal statement or a general consensus ['ijmāᶜ] to that effect.[1] Elsewhere, in discussing a matter of Islamic ritual that has only been reported in ḥadīth and āthār as an action performed by the Prophet and his Companions on different occasions, Ibn Rushd observes again that reports of actions are not sufficient to establish legal obligation [al-wujūb] until those actions are supported by more explicit proofs.[2]

Ibn al-Ḥājib[3] has this concept in mind when he states in his discussion of the legal implications of the deeds ['afᶜāl] of the Prophet that reports which relate actions the Prophet was seen doing are ambiguous legal arguments until the legal status of those actions has been clarified. He continues to observe that, until the legal status of those reported actions has been clarified, one cannot validly lay

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[1]Ibn Rushd, 1:79 (1). [2]Ibid., 1:133 (7).

[3]Jamāl-ad-Dīn ᶜUthmān ibn ᶜUmar (570-646/1174-1249), known as "IBN AL-ḤĀJIB" [the chamberlain's son], was a notable Egyptian Mālikī faqīh and legal theorist of Kurdish background. He was born in Upper Egypt, grew up in Cairo, and lived in Damascus. He died in Alexandria. His father was a chamberlain, and, hence, his name. Ibn al-Ḥājib is noted for his work on legal theory, "Muntahā 's-Sūl", and for his abridgement of it. He had extensive knowledge of Arabic, wrote works on grammar and commentaries on the philological works of az-Zamakhsharī. Ziriklī, 4:374.

claim to be imitating the Prophet merely because one is imitating those actions. One must first determine under what circumstances those actions were done, what the degree of obligation or desirability behind them is, whether they were done regularly, and so forth.[1]

Although reports of actions are regarded as insufficient evidence in themselves to establish that others are legally bound to imitate that act, reports of contrary actions by the Prophet or Companions and Successors whom Mālik regards as authoritative are regarded to be a sufficient indication that, indeed, those actions are not obligatory. The assumption in such cases is that, if the act in question were obligatory, these authoritative persons would not have failed to have done it.[2] There are several instances in the Muwaṭṭa' in which Mālik appears to be using reports of contrary actions to indicate that the actions in question are not obligatory. For example, Mālik seems to be using this principle in the Muwaṭṭa' to demonstrate that it is not obligatory for a Muslim to renew wuḍū' [ritual ablutions] after having a nosebleed. In one short chapter entitled "Mā Jā'a

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[1]See Ibn al-Ḥājib, pp. 51-52.

[2]Cf. Sulaimān ibn Khalaf AL-BĀJĪ, Sharḥ Muwaṭṭa' 'Imām Dār al-Hijrah, Sayyidinā Mālik ibn 'Anas, 7 vols. (Egypt: Maṭbaᶜat as-Saᶜādah, 1331/[1912]), 1:350-351.

fī 'r-Ru^{c}āf" [that which has come down regarding nosebleeds], Mālik cites three āthār which report that ^{c}Abd-Allāh ibn ^{c}Umar, ^{c}Abd-Allāh ibn ^{c}Abbās, and the prominent Madīnan Successor Sa^{c}īd ibn al-Musayyab were observed to have had nosebleeds while praying. They broke off the prayer, renewed wuḍū', returned, and completed the prayer. In the chapter that follows, entitled "Al-^{c}Amal fī 'r-Ru^{c}āf" [the ^{c}amal regarding nosebleeds], Mālik cites an 'athar that reports that Sa^{c}īd ibn al-Musayyab and the son of ^{c}Abd-Allāh ibn ^{c}Umar, Sālim ibn ^{c}Abd-Allāh, were observed to have had nosebleeds while praying and did not break off their prayers or renew their wuḍū'.[1] All of the āthār in these two chapters are reports of actions. Yet, while the reports of the actions being performed are not regarded in Mālikī legal theory to be a sufficient indication of obligation, the reports of contrary actions are regarded to be an indication that the actions are not obligatory. The conclusiveness of the contrary reports in this case is increased by the fact that they are supported by ^{c}amal.

Similarly, although some isolated ḥadīth have been transmitted relating that the Prophet prohibited drinking while standing, Mālik indicates that it is not obligatory that one sit down while drinking and that it is not reprehensible to drink while standing, by citing āthār which re-

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[1]Muwaṭṭa', 1:38-39.

port that ᶜUmar ibn al-Khaṭṭāb, ᶜUthmān ibn ᶜAffān, ᶜAlī ibn 'Abī Ṭālib, ᶜAbd-Allāh ibn az-Zubair, and ᶜAbd-Allāh ibn ᶜUmar used to drink while standing. He cites another 'athar which reports that neither ᶜĀ'ishah, the wife of the Prophet, or Saᶜd ibn 'Abī Waqqāṣ held that there was any harm in drinking while standing.[1]

Finally, Mālik appears to be applying this principle in a chapter, which I shall discuss in more detail later,[2] in which Mālik states that it is not obligatory that one prostrate oneself after reading certain verses of the Qur'ān, although āthār in the same chapter report that 'Abū Hurairah, ᶜUmar ibn al-Khaṭṭāb, and ᶜAbd-Allāh ibn ᶜUmar were observed prostrating themselves after having read some of these verses. In the same chapter, Mālik cites an 'athar that reports that ᶜUmar ibn al-Khaṭṭāb once recited such a verse while speaking to the people from the minbar [pulpit] during the Friday congregational prayers. He descended from the minbar, prostrated himself, and the people prostrated themselves after him. The next Friday, according to the report, ᶜUmar recited the same verse on the minbar, but, when the people prepared to prostrate themselves, he prohibited them from doing so, telling them that it was not obligatory. This 'athar illustrates well the principle of Mālikī legal theory that reports of actions are not sufficient in themselves to establish legal

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[1]Muwaṭṭa', 2:925-926; see Zurqānī, 5:306-307.

[2]See below, pp. 629-631.

obligation, while reports of the contrary actions of authoritative persons are regarded to be a sufficient indication that those actions are not obligatory. In this case, ᶜUmar ibn al-Khaṭṭāb has indicated himself that that is the conclusion which one is to draw from his contrary actions.[1]

Preliminary Reflections on 'Ijmāᶜ

Mālik uses a type of 'ijmāᶜ frequently in his Muwaṭṭa', which he refers to variously as "al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā" [that matter upon which there is consensus among us], "al-'amr al-ladhī lā 'khtilāf fīhi ᶜindanā" [that matter regarding which there is no difference of opinion among us], and so forth. This Madīnan type of 'ijmāᶜ, which Mālik uses, is part of the ᶜamal of Madīnah. Therefore, I will discuss it further in the chapter pertaining to the concept of ᶜamal.[2] Nevertheless, it is worthwhile to consider briefly prior to that how the concept of 'ijmāᶜ may have evolved historically and how fuqahā' like Mālik may have conceived of it prior to ash-Shāfiᶜī.

Ash-Shāfiᶜī conceives of 'ijmāᶜ as consensus on the validity of matters of Islamic law that is total and without exception. It is a consensus of the 'ummah, as it were, a consensus such that wherever in the Islamic realm one should

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[1]Muwaṭṭa', 1:205-207; cf. al-Bājī, 1:349-353; Ibn Rushd, 1:132 (13).

[2]See below, pp. 424-428, 691-730.

travel one would not find Muslims ignorant of such matters or doubting their validity. Hence, 'ijmā^c for ash-Shāfi^cī pertains primarily to matters like the basic obligations [farā'iḍ] of the religion, which are well-known and universally agreed upon.[1] Such a definition of 'ijmā^c, as Ahmad Hasan has pointed out, limits greatly the practical utility of the concept, since matters which have such universal agreement are relatively few and are generally well-established in the textual sources of Qur'ān and ḥadīth, such that it is not necessary to depend upon 'ijmā^c to establish their validity.[2]

Although al-Qāḍī ^cIyāḍ argues that Mālik did not reject the 'ijmā^c of the 'ummah,[3] this appears to me to be an academic question. Since Mālik regarded Madīnan 'ijmā^c to be authoritative, it is not conceptually possible that he could have rejected the validity of an 'ijmā^c of the 'ummah, which must necessarily include the 'ijmā^c of Madīnah, since Madīnah is part of the 'ummah.[4] The question remains,

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[1]See Muḥammad ibn 'Idrīs ASH-SHĀFI^cĪ, "Kitāb Jimā^c al-^cIlm," in Kitāb al-'Umm by Muḥammad ibn 'Idrīs ash-Shāfi^cī, 7 vols. (Egypt: Al-Maṭba^cah al-Kubrā al-'Amīrīyah bi-Būlāq, 1325/[1907]), 7:250-265; pp. 255 (26), 256 (26), 257 (24); and idem, Ar-Risālah, ed. 'Aḥmad Muḥammad Shākir (Cairo: Maṭba^cat Muṣṭafā al-Bābī al-Ḥalabī wa 'Awlādihī, 1358/1945), pp. 531-535; and 'Abū Zahrah, Ash-Shāfi^cī, pp. 293-295.

[2]Ahmad Hasan, p. 56. [3]^cIyāḍ, 1:72-73.

[4]Another question, however, is whether or not 'ijmā^c was ever reached among non-Madīnan fuqahā' on questions regarding which there were differences of opinion in Madīnah. With regard to this question, it is reported that the Egyp-

however, as to whether or not Mālik would have regarded a concept of the total consensus of the 'ummah to have had enough practical merit to be a valid and viable principle of law. Certainly, Mālik would not have been willing to cease following his own Madīnan 'ijmā^c in matters on which there were differences of opinion outside Madīnah, since Mālik often relies on Madīnan 'ijmā^c in matters regarding which he knows well that there were fuqahā' outside Madīnah who disagreed, especially some of the fuqahā' of Kūfah.[1] Ma^crūf ad-Dawālībī has suggested, furthermore, that Mālik relied upon Madīnan 'ijmā^c largely because of the practical consideration that, in addition to whatever merits it had as an authoritative legal argument, the content of Madīnan 'ijmā^c could be established and verified. The content of the 'ijmā^c of the 'ummah, on the other hand, ad-Dawālībi reasons, would have been virtually impossible to establish and verify.[2]

According to one ḥadīth, which is said to have been

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tian muḥaddith and faqīh Sa^cīd ibn 'Abī Maryam (144-224/761-838) [for data see above, p. 87 , note 4] held that there was not a matter pertaining to the sunnah upon which 'ijmā^c had been reached that was contrary to what is in Mālik's Muwaṭṭa' (cited by ^cIyāḍ, 1:191). One might take this statement to be an indication, perhaps, that, according to Ibn 'Abī Maryam, consensus had not been reached outside Madīnah on matters regarding which there had not been 'ijmā^c in Madīnah or, for that matter, regarding which there had been differences of opinion in Madīnah.

[1]See below, pp. 691-730.

[2]Ad-Dawālībī, p. 336.

transmitted by Mālik from ᶜAlī ibn 'Abī Ṭālib, ᶜAlī asked the Prophet what should be done when questions arise that have no precedent in Qur'ānic legislation or the Prophet's sunnah. The Prophet is said to have answered:

> Gather together those of the believers who have knowledge and let it be a matter of consultation [shūrā] among yourselves. But do not judge [in such matters] on the basis of the opinion of just a single one [of you].[1]

Whether authentic or not, this ḥadīth portrays a method of reaching legal decisions in unprecedented matters that is said to have characterized the reigns of 'Abū Bakr, ᶜUmar, and the other "rightly guided caliphs". Especially 'Abū Bakr and ᶜUmar are reported to have brought together the prominent Companions in Madīnah for consultation in such matters and to have made their decisions on the basis of that consultation.[2] Such decisions were made at times, however, in the absence of some prominent and knowledgeable Companions who were not in Madīnah at the time. Nevertheless, once decisions were made on the basis of consultation with those who were present in Madīnah, those decisions were ex-

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[1]Ibn Qayyim, 'Iᶜlām, 1:73-74, cited by az-Zarqā, 1:192.

[2]See az-Zarqā, 1:170, 192; ad-Dawālībī, pp. 49-88; 'Abū Zahrah, Mālik, p. 103; ᶜAlāl al-Fāsī, Maqāṣid ash-Sharīᶜah al-'Islāmīyah (Casablanca: Maktabat al-Waḥdah al-ᶜArabīyah, [1967]), pp. 116-117; and Ignaz Goldziher, Die Ẓāhiriten: Ihr Lehrsystem und ihre Geschichte; ein Beitrag zur Geschichte der muhammedanischen Theologie (Leipzig: n.p., 1884, reprint ed., Hildesheim: Georg Olms Verlagsbuchhandlung, 1967), p. 8.

ecuted, put into law, and, hence, became part of the ᶜamal of their contemporaries.[1]

According to ᶜAlāl al-Fāsī and Muṣṭafā az-Zarqā the concept of 'ijmāᶜ grew out of this consultative legislative method of the early caliphs. It was not, however, the type of total consensus which later legal theorists conceived to be the definition of 'ijmāᶜ. Nevertheless, it was a workable concept. Its authoritativeness did not rest, according to al-Fāsī, in the absolute, theoretical conclusiveness which later legal theorists attributed to the total consensus of the 'ummah, but rather on the soundness of the consultation of the prominent Companions reinforced by the authority of executive order. In this sense, therefore, early 'ijmāᶜ would have been to a considerable extent a function of the political and legal authority of the Islamic caliph. Hence, whenever the caliph reached agreement on a matter with his consultative committee, that matter of consensus became a matter of law which the people were required to follow by virtue of the political authority of the caliph who proclaimed it. Although, according to al-Fāsī, it was still permissible for those who had not been present in the consultation to express opinions to the contrary, their contrary opinions did not effect the application of the law.[2]

Az-Zarqā refers to this type of early caliphal 'ijmāᶜ

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[1]Al-Fāsī, pp. 116-117; Az-Zarqā, 1:170, 192.

[2]Al-Fāsī, pp. 116-117; Az-Zarqā, 1:170, 192.

as "ijtihād al-jamāᶜah" [group ijtihād].[1] It was prominent Companions [ru'asā' an-nās] only who made up that group. Companions of lesser stature and the common people were not included but, on the contrary, were bound legally to follow the conclusions of the group. Furthermore, such decisions were taken in the absence of some prominent Companions, and the early caliphs are not reported to have suspended making consultative decisions in matters until they could assemble all of the prominent Companions or collect their opinions.[2] ᶜUmar ibn al-Khaṭṭāb, however, is reported to have prohibited the Companions during his caliphate from settling outside Madīnah, and 'Abū Zahrah believes that one of his reasons in doing that was to have them available for consultation.[3]

This "group ijtihād" was not free from the possibility of error. Its value, nevertheless, was that it provided the caliph with a sound and practical method for solving problems and executing decisions. Al-Fāsī holds, furthermore, that this early type of 'ijmāᶜ ceased to be a reality during what he describes as the "despotism" that came about after the end of the early caliphate. Consultative bodies like those of the early period no longer had the importance they had had once they were forced to function in the presence of despotic rulers. Thus, al-Fāsī reasons, the original type of 'ijmāᶜ ceased to be a reality, and the conception

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[1]Az-Zarqā, 1:192.

[2]See 'Abū Zahrah, Mālik, p. 327; ad-Dawālībī, pp. 86-87; al-Fāsī, p. 117.

[3]'Abū Zahrah, Mālik, p. 103.

of 'ijmā^c deteriorated into "futile" discussions about the authoritativeness of a total 'ijmā^c of the 'ummah, which could rarely if ever occur.[1]

The Madīnan 'ijmā^c to which Mālik subscribes may be a reflection of this "group ijtihād" or limited 'ijmā^c of the caliphal period. It is notable in that regard that a large number of those matters of ijtihād in the Muwaṭṭa' that Mālik describes as being part of Madīnan 'ijmā^c go back to the caliphal period, especially to the caliphate of ^cUmar ibn al-Khaṭṭāb.[2]

Furthermore, the question should be asked whether or not Mālik means by 'ijmā^c--or, more properly speaking, "ijtimā^c", since that is the form which he uses--the sort of total consensus that ash-Shāfi^cī means by that term, even if that be a total consensus of the fuqahā' of Madīnah. Ash-Shāfi^cī claims, for example, that Mālik sometimes uses the terms "al-'amr ^cindanā" [that matter which we regard to be correct; symbol: AN] and "al-'amr al-mujtama^c ^calaihi ^cindanā" [symbol: AMN] for matters concerning which there were differences of opinion even in Madīnah.[3]

As far as the term AN is concerned, I do not believe that it ever refers to a consensus of the fuqahā' of Madīnah. On the contrary, my analysis of Mālik's use of that term is

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[1]Al-Fāsī, p. 117. [2]See below, pp. 691-730.

[3]Ash-Shāfi^cī, "Ikhtilāf Mālik," pp. 202-203,267; idem, Ar-Risālah, pp. 531-535.

that Mālik uses it for matters regarding which there had been significant differences of opinion in Madīnah. Sometimes, he will state in the Muwaṭṭa' what those differences of opinion were and who the Madīnan fuqahā' were who held them.[1]

As far as the term AMN is concerned, however, I have not found examples in the Muwaṭṭa' of Mālik's using that term regarding a given matter and then citing contrary opinions of other Madīnan fuqahā' as he has sometimes done in the case of AN's. It is conceivable that those dissenting Madīnan ᶜulamā' to whom ash-Shāfiᶜī is referring were among those ᶜulamā' of Madīnah whose opinions Mālik did not regard to be worthy of consideration.[2]

However, it is also conceivable that Mālik did not mean by this "ijtimāᶜ" the one hundred percent consensus that ash-Shāfiᶜī had in mind when referring to 'ijmāᶜ. Rather by ijtimāᶜ Mālik may have had in mind an extensive or even overwhelming general consensus of the Madīnan fuqahā', which would not have excluded the possibility of the dissension of a few. If this were true, then Mālik's term AMN, the second most common term in the Muwaṭṭa', would be somewhat akin to Mālik's most common term, AN. The difference between them, in that case, might have been one of degree.

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[1]See below, pp. 731-760.

[2]See above, pp. 75-76.

I believe this hypothesis to be worthy of consideration for two reasons. First of all, the word "ijtimāᶜ" is not semantically restricted to refer to a one hundred percent consensus, although it can carry that meaning. Indeed, the adjectives "jamīᶜ" and "'ajmaᶜ", which mean "all", come from the same root and are part of the semantic background of ijtimāᶜ and especially 'ijmāᶜ which make them suitable terms for the concept of total consensus. Nevertheless, words like "jamᶜ" and "jamāᶜah" and other nouns referring to general groups and groupings are also part of the semantic background of ijtimāᶜ and do not give the same unambiguous indication of totality as in the words jamīᶜ and 'ajmaᶜ. Thus, there is latitude in the semantic scope of the word ijtimāᶜ, and it could be used to include the concept of preponderant as opposed to total consensus.[1] Furthermore, as I pointed out earlier, the relationship between concepts and the terms which stand for them is potentially arbitrary, and the proper methodology for determining what Mālik himself meant by the term ijtimāᶜ is not to look in an Arabic dictionary only but, more importantly, to study how Mālik used the word in his Muwaṭṭa'.[2]

Secondly, this hypothesis seems worthy of consideration because Mālik uses some terms in his terminology to indicate absolute consensus quite explicitly, by affirming that there were no contrary opinions in Madīnah. This is the case,

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[1]Cf. Lane, 2:455-459. [2]See above, pp.14-20.

for example, with the terms "as-sunnah al-latī lā 'khtilāf fīhā ᶜindanā" [that sunnah in which there is no difference of opinion among us; symbol: S-XN], "al-'amr al-ladhī lā 'khtilāf fīhi ᶜindanā" [that matter concerning which there is no difference of opinion among us; symbol: A-XN], and "al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā wa 'l-ladhī lā 'khtilāf fīhi" [that matter upon which there is ijtimāᶜ among us and regarding which there is no difference of opinion; symbol: AMN-X]. It is noteworthy, therefore, in light of these explicit terms of total consensus, that the term AMN does not deny that there were any differences of opinion in Madīnah regarding it. Hence, AMN may refer to matters of preponderate but not necessarily total consensus in Madīnah.

Al-ᶜUrf wa 'l-ᶜĀdah: Local Customs and the Law

'Abū Zahrah believes that the Mālikī school gives local customs a more extensive role to play in determining the content and application of Islamic law than any of the other major sunnī schools, even the Ḥanafī, which is also noted for the extensive role it gives to local customs.[1] Consideration of local customs, however, is a part of the legal theory of each of the major sunnī schools of law, including the Shāfiᶜī.[2] 'Abū Zahrah contends that local cus-

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[1] 'Abū Zahrah, Mālik, p. 420.

[2] See al-Qarāfī, 1:143, 87-88; Zakī-ad-Dīn Shaᶜbān, pp. 176-178; 'Abū Zahrah, Mālik, pp. 420-424. Shaᶜbān and

toms play a more extensive role in the Mālikī school, however, because of the generally strong connection between local customs and the maṣāliḥ of the people. Hence, 'Abū Zahrah, reasons, the authority that the Mālikī school gives local customs is a function of the high regard it gives to maṣāliḥ in general.[1] As I will show, istiḥsān, which is very common in the Mālikī school, is often done on the basis of local customs. Mālik also is known to perform istiḥsān on the basis of maṣlaḥah only.[2] According to 'Abū Zahrah, however, when Mālik performs istiḥsān on the basis of local customs it is cognate to his performing it on the basis of maṣlaḥah, because he regards those local customs to be instances of maṣāliḥ.[3]

Similarly, ash-Shāṭibī holds that local customs are given consideration in Islamic law out of regard for the maṣāliḥ they embody. Much of Islamic law as set forth by the Prophet, he observes, was an affirmation of pre-Islam-

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'Abū Zahrah cite references that show that "sound local customs" [al-ᶜurf aṣ-ṣāliḥ] are regarded to be legitimate in each of the four major sunnī schools. Ash-Shāfiᶜī's attitude toward local customs, according to 'Abū Zahrah, is that they are valid as long as they pertain to matters of law for which there are no textual directives in the sources of Islamic law to which ash-Shāfiᶜī subscribes. Shāfiᶜī reasoning in the matter, he states, is that, since the people have grown accustomed to their local customs, it is not permissible to prohibit them except on the basis of a clear legal text; ibid., pp. 420-421. Nevertheless, local customs have a much more extensive role in the Mālikī school, for example, since Mālikīs draw exceptions to texts on the basis of local customs; see ibid., p. 421 and the above discussion.

[1] 'Abū Zahrah, Mālik, pp. 420-421. [2] See below, pp. 250-251.

[3] 'Abū Zahrah, Mālik, p. 421.

ic Arab customs. The pre-Islamic Arabs like human societies in general, ash-Shāṭibī reasons, developed even in the absence of Prophetic guidance many sound customs that were well-suited for the environment and the circumstances in which they were living. Thus, the Prophet abolished those customs of the pre-Islamic Arabs that were detrimental, but he affirmed and perfected those that were beneficial. Similarly, ash-Shāṭibī continues, the Prophet is reported in various ḥadīth to have described his purpose as one of perfecting the customs and excellent manners of the people, not of obliterating them. The high regard that Mālik gives local customs, ash-Shāṭibī concludes, is in keeping with the Prophet's approach to the customs of the pre-Islamic Arabs.[1]

There are several illustrations in the Muwaṭṭa' and Mudawwanah of Mālik's applying Islamic law with reference to local customs. I have already referred to Mālik's performing istiḥsān on the basis of local customs. Since the fundamental characteristic of Mālik's concept of istiḥsān is that it draws exceptions to general precepts of law, which would be extended by way of qiyās, Mālik's performing istiḥsān on the basis of local customs indicates that, in many instances at least, local customs are more authoritative for him than qiyās.[2]

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 2:213, cited by 'Abū Zahrah, Mālik, pp. 374-375.

[2]See below, pp. 245-254.

Mālik relies upon local customs, for example, to determine in cases of slander whether the words that were used were actually slanderous. Unlike the majority of non-Mālikī fuqahā', Mālik is not primarily concerned with the literal meaning of the words. Rather he is concerned with the connotations they carry in the local linguistic usages of the persons in question. For, although the literal meaning of the words may be harmless, the connotations that they evoke in the linguistic usage of those who employed them may be slanderous.[1]

Mālik holds that payment of zakāh is due on the harvests of pulse [al-quṭnīyah]. However, he defines pulse by reference to the customary knowledge of the people of what the different varieties of pulse are. Thus, he states, pulse include chick-peas [al-ḥimmaṣ], lentils [al-ᶜadas], kidney beans [al-lūbiyā], the common vetch [al-julbān], and all other types of legumes that "the people know well to be of the variety of pulse" ["wa kull mā thabata (sic) maᶜrifatuhū ᶜinda 'n-nās 'annahū quṭnīyah"]. Mālik continues to point out that it is this customary knowledge of the people regarding what pulse is, upon which one is to rely, regardless of how much the names and colors of the different varieties of pulse may vary.[2]

Local customs also play a significant role in Mālikī

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[1]Ibn Rushd, 2:266 (13). [2]Muwaṭṭa', 1:275.

laws of what words and actions constitute agreements to buy, sell, rent, and other types of contractual agreements. By reference to the local customs of each region, Mālik defines what words and acts shall be regarded to be sufficient indication that such a contractual agreement has been concluded by persons of those regions.[1] Thus, if it is the local custom of a people to agree to buy or sell without shaking hands, which is an Arab custom, a person of that region who makes an agreement to buy or sell according to his local customs, for example, would not be able to declare the agreement he made to be void on grounds of the technicality that he did not shake hands. Similarly, Mālik defines gift giving according to the local customs in terms of which the people of a region give gifts to each other.[2]

According to the Islamic law of theft, a thief's right hand will be cut off if he is of age and is sane when he commits the act and is not under compulsion to steal because of persons who force him to or because of circumstances, like poverty. Furthermore, the goods he steals must have a certain minimal value, and, finally, he must have removed those goods from a ḥirz [a protective enclosure].[3] Thus, for example, if a thief who fell within the first of these categories were to steal a purse that had been abandoned

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[1]Ibn Taimīyah, p. 50. [2]Ibid.

[3]See, for example, Ibn Rushd, 2:269.

on the street, his punishment for that crime would not include his hand being cut off--regardless of the value of the purse--because he had not removed it from a ḥirz. The definition of ḥirz, therefore, is a very important part of the Islamic law of theft. Mālik defines ḥirz by reference to local custom; a ḥirz for him is that which people customarily regard as serving to protect their property. One result of this definition is that Mālik regards graves to be a ḥirz for the contents of graves. Thus, he rules that the hands of grave robbers, who dig up graves to sell again the shrouds of the dead, should be cut off. 'Abū Ḥanīfah, however, disagrees because he defines the ḥirz differently.[1]

Analogical Reasoning: Qiyās

Introduction

Analogical reasoning is part of the legal reasoning of each of the four major sunnī schools.[2] Although one encounters the term "qiyās" in pre-Shāfiᶜī Ḥanafī writings and there are other indications that the term had been used before the time of ash-Shāfiᶜī,[3] I have found no examples of Mālik's using that term. Nevertheless, there are many

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[1]Ibn Rushd, 2:271 (17).

[2]See 'Abū Zahrah, 'Abū Ḥanīfah, pp. 325, 336-339; idem, Ash-Shāfiᶜī, pp. 298-301, 309-310; at-Turkī, pp. 434, 559, 561-562, 573-576.

[3]See, for example, above, pp. 174-175.

examples in the Muwaṭṭa' and Mudawwanah of Mālik's using analogical reasoning. Probably, as 'Abū Zahrah has suggested, analogical reasoning is a natural part of the human thought process, which thinks in terms of comparisons and contrasts. He cites a quotation attributed to al-Muzanī,[1] one of ash-Shāfi^{c}ī's most important students:

> From the times of the Messenger of God, peace be upon him, until our own day, the fuqahā' have reasoned by analogies [al-maqāyīs] in all matters of law that pertain to our religion. There has been consensus among them that the likeness of that which is true is [also] true and the likeness of that which is false is [also] false. Thus, it is not permissible for anyone to deny the validity of qiyās; for it is [only] a matter of drawing likenesses between things and applying similar [rulings] to them [on that basis] ["at-tashbīh bi-'l-'umūr wa 't-tamthīl ^{c}alaihā"].[2]

The issue of primary importance, however, is that of how each of these schools understood analogical reasoning, what stipulations they put on its application, and what authority they gave it in the hierarchy of the sources of law and principles of legal reasoning to which they subscribed. In this regard, there are some notable differences between the schools.

I referred earlier to reports from 'Abū Yūsuf in which he advises his opponent to do qiyās ["qis"] only on the basis of the Qur'ān and the well-known sunnah.[3] Ash-Shaibānī in-

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[1]Ismā^{c}īl ibn Yaḥyā AL-MUZANĪ (175-264/792-877) lived and died in Egypt and was one of the most important proponents of the Shāfi^{c}ī school. Al-Muzanī frequently disagrees with ash-Shāfi^{c}ī, however, and for that reason some have spoken of a distinctive school of al-Muzani. See Sezgin, 1:492.

[2]Cited by 'Abū Zahrah, Mālik, p. 344.

[3]See above, pp. 174-175.

sists that "qiyās" is to be done in matters for which there are no reported precedents, on the basis of those precedents [āthār] which have been reported.[1] Similarly, ash-Shāfi^{c}ī affirms that ash-Shaibānī's basic position ['aṣl] in fiqh was that one must base one's opinions either on a binding legal text [khabar lāzim] or qiyās.[2] In "Jimā^{c} al-^{c}Ilm" ash-Shāfi^{c}ī's opponent states that "qiyās is a firmly established type of knowledge regarding which the people of knowledge have reached consensus that it is valid" ["al-qiyās al-^{c}ilm ath-thābit al-ladhī 'ajma^{c}a ^{c}alaihi 'ahl al-^{c}ilm 'annahū ḥaqq"].[3]

Instances in the Muwaṭṭa' and Mudawwanah where Mālik employs analogical reasoning are often introduced by or include expressions that indicate that they are analogies. Although he uses some expressions more commonly than others, there is considerable diversity among them. For example, he will say, "This is like [such and such] . . . ["wa hādhā mithl . . ."];[4] or "This is of the same status as [such and

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[1]Muḥammad ibn al-Ḥasan ASH-SHAIBĀNĪ, Kitāb al-Ḥujjah ^{c}alā 'Ahl al-Madīnah, ed. Mahdī Ḥasan al-Kīlānī al-Qādirī, 2 vols. (Haidarabad: Al-Maṭba^{c}ah ash-Sharqīyah, 1385/1965), 1:43-44.

[2]Muḥammad ibn 'Idrīs ASH-SHĀFI^{c}Ī, "Kitāb ar-Radd ^{c}alā Muḥammad ibn al-Ḥasan," in Kitāb al-'Umm by ash-Shāfi^{c}ī (Būlāq ed.), 7:277-302; p. 280 (20); cf. Zafar Ishaq Ansari, "Islamic Juristic Terminology before Šāfi^{c}ī: A Semantic Analysis with Special Reference to Kūfa," Arabica, 19: 255-300; pp. 288-292.

[3]Idem, "Jimā^{c} al-^{c}Ilm," p. 258 (6).

[4]See Muwaṭṭa', 2:494, 647, 648, 795, 841; and Mudaw-

such]. . ."["hādhā bi-manzilat . . ."];[1] or, "That which will make this clear to you is that . . . "["wa mā yubayyinu laka hādhā 'anna . . ."];[2] and similar expressions.[3]

A General Analysis of Analogical Reasoning

Before considering the different stipulations that sunnī schools of law put upon the use of analogical reasoning, I would like to present briefly John Maynard Keynes's analysis of the nature of analogical reasoning, since his analysis and the terminology he uses are of use in discussing the treatment of analogical reasoning in Islamic law.

According to Keynesian terminology, any set of things will be said to be analogous to each other with regard to all characteristics and properties that they have in common, whether relevant or irrelevant. Keynes calls this set of

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wanah, 1:188 (21); 2:361-362 (30).

[1]See Muwaṭṭa', 1:252, 272, 276, 355; 2:509, 568, 646, 668, 673, 706, 709, 741, 742, 765, 775, 794; and Mudawwanah, 1:188 (21), 293 (10), 294 (24); 2:361-362 (30).

[2]See Muwaṭṭa', 2:768, 775 (occurs four times here); and Mudawwanah, 1:294 (24); 2:155 (3), 156 (27), 198 (20), 394 (5); 3:111 (5), 111 (20), 129 (13), 210 (19), 211 (4), 214 (7), 216 (2).

[3]The following expressions are sometimes followed by analogies: "This is because . . ." ["wa dhālika 'anna . . ."], Muwaṭṭa', 2:611; "this is of [the same]guise as . . ." ["wa hādhā ka-hai'at . . ."], Muwaṭṭa', 2:636; "the explanation for that is . . ." ["wa tafsīr dhālika 'anna . . ."], Muwaṭṭa', 2:666, 796; "the proof that this is [such and such] is . . ." ["wa 'd-dalīl ᶜalā 'anna . . ."], Muwaṭṭa', 1:254; "the basis of all these [matters] is that . . ." ["wa 'aṣl hādhā kullihī 'anna . . ."], Mudawwanah, 2:183 (13); "also

all common characteristics and properties the "known positive analogy" of the members of that set. But those common characteristics of the known positive analogy are said to be "relevant" which are inseparably connected to other common characteristics and properties of the members of the set. Keynes refers to these relevant analogies as "signifying analogies". The common characteristics and properties that always follow from them are called "signified analogies". For example, in the universal proposition, "All humans are mortal," "being human" is the signifying analogy, and "being mortal" is the signified analogy. Thus, anything that has the signifying analogy of being human will always have the signified analogy also of being mortal. Those parts of the total positive analogy of a set that are not signifying analogies are said to be "irrelevant". Hence, in this example, the analogies of having a certain range of weights or certain varieties of colors, for instance, are irrelevant analogies.[1]

The purpose of empirical science, according to this Keynesian terminology, is to discover the signifying and the

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similar to this is . . ." ["wa ka-dhālika 'aiḍan . . ."], Muwaṭṭa', 2:734; analogies are sometimes set forth without any introductory expressions, as, for example, in Mudawwanah, 3:118 (10). In explaining one instance of Mālik's use of analogical reasoning, Ibn al-Qāsim says, "And Mālik's ᶜillah [signifying analogy] in this case is . . ."["wa ᶜillat Mālik hāhunā . . ."], Mudawwanah, 2:198 (19).

[1]Cohen and Nagel, pp. 286-288.

signified analogies in the total positive analogy of any set of observed things. Similarly, it is important to observe that sound analogical reasoning--that is, analogical reasoning that discovers the true signifying and signified analogies in any set of things--must be based on fair sampling and an adequate enumeration of examples.[1]

What Keynes calls the "signifying analogy" is an accurate description, I believe, of what Islamic legal theorists have referred to as the "ᶜillah" [occasion] of a qiyās. Similarly, what Keynes refers to as the "signified analogy" corresponds to the ḥukm [ruling, precept] of the legal precedent, which is applied to an unprecedented matter by virtue of its sharing the same ᶜillah as the precedented matter. According to the Islamic definition of qiyās, the ḥukm, i.e. the signified analogy, will be applied to any matter in which the ᶜillah, i.e. the signifying analogy, is present.[2]

A key issue in the application of qiyās in Islamic law is that of discovering the correct signifying analogy for any precedent of law. I will discuss this in greater detail in my treatment of the concept of qiyās in different sunnī schools of law. The terms used for this process

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[1]Cohen and Nagel, pp. 287-288.

[2]Cf. al-Qarāfī, 1:66, 124-126; Ibn Rushd [al-Jadd], 1:23; Zakī-ad-Dīn Shaᶜbān, pp. 103-104, 126-129; al-Fāsī, p. 120.

in Islamic legal theory, however, are takhrīj al-manāṭ [lit., extracting the point of suspension, i.e. the signifying analogy] and tanqīḥ al-manāṭ [clarifying the point of suspension, i.e. the signifying analogy]. The term takhrīj al-manāṭ is generally applied to the extraction of the signifying analogy of a precept by some means of ijtihād in cases when that signifying analogy has not been indicated in a legal text or some other authoritative source of law. Tanqīḥ al-manāṭ, on the other hand, is used to designate the process of elimination whereby the mujtahid determines what the signifying analogy of a precept is, in cases when authoritative legal texts have set forth various analogies for a precept without specifying which of them is the signifying analogy. An example often given of tanqīḥ al-manāṭ is that of interpreting a well-known ḥadīth that reports that a bedouin informed the Prophet that he had had sexual relations with his wife during the fast of Ramaḍān. The Prophet then gave him the option of three types of atonement. According to Islamic legal theorists, this text sets forth several analogies. One, for example, is that the man was a bedouin, another that he had sexual relations with his wife, a third that he had sexual relations with his wife during the fast, or, more broadly, that he violated the fast of Ramaḍān. By the process of tanqīḥ al-manāṭ, the mujtahid eliminates those of these analogies which are irrelevant until he arrives at the signifying analogy. One of the methods by which this is done is

that of finding examples in the authoritative sources of law where those analogies were present but the ruling, i.e. the signified analogy, was not applied.[1]

Finally, the term taḥqīq al-manāṭ [verification (of the presence) of the signifying analogy] is used in the terminology of Islamic legal theorists to describe the process of ijtihād whereby one determines whether the signifying analogy, which has been established earlier in a given precedent, is actually present in an unprecedented matter. For example, if in the case of the prohibition of wine it were determined that the signifying analogy of prohibition, which is the signified analogy, is that wine is an intoxicant, one would have to determine whether or not another type of beverage were an intoxicant before one could apply the signified analogy of prohibition. The process of determining whether another type of beverage is an intoxicant is taḥqīq al-manāṭ.[2]

Ash-Shāfiᶜī's Concept of Qiyās

Ash-Shāfiᶜī differs notably from 'Abū Ḥanīfah and Mālik 1) in the stipulations he places on how and from what sources the signifying analogies of qiyās will be arrived at

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[1]Cf. Zakī-ad-Dīn Shaᶜbān, pp. 146-147; 'Abū Zahrah, 'Abū Ḥanīfah, p. 336; al-Qarāfī, 1:123; al-Fāsī, p. 120.

[2]See above citations and ash-Shāṭibī, Al-Muwāfaqāt, 3:89.

(i.e. in matters pertaining to takhrīj and tanqīḥ al-manāṭ), 2) in the authority that he gives qiyās, and 3) in the attitude he takes regarding qiyās and other modes of ijtihād.

Regarding the first point of difference, ash-Shāfi^{c}ī holds that the signifying analogies upon which qiyās is based must be deduced from explicit, authoritative legal texts. Furthermore, an even more fundamental difference between him and 'Abū Ḥanīfah and Mālik in this regard is that ash-Shāfi^{c}ī regards isolated ḥadīth with sound 'isnād's to be a valid basis from which to deduce signifying analogies.[1] 'Aḥmad ibn Ḥanbal is much like ash-Shāfi^{c}ī in this regard, with the exception that Ibn Ḥanbal expands greatly the number of textual sources that he regards to be valid sources from which to deduce signifying analogies--including, for example, the āthār of the Companions, mursal ḥadīth, and ḥadīth with 'isnād's that are less than sound [ṣaḥīḥ]. Furthermore, 'Aḥmad ibn Ḥanbal does not resort to qiyās except when he is unable to find a directly applicable ruling in any of these numerous textual sources to which he subscribes.[2]

As I mentioned above in the brief analysis of analogical reasoning, conclusive analogical reasoning--that is, which is based on true signifying analogies--requires fair

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[1]See Ash-Shāfi^{c}ī, Risālah, pp. 39, 25; idem, "Jimā^{c} al-^{c}Ilm," pp. 252 (10), 253 (17, 23), 254 (3), 256 (30, 34), 258 (6); idem "Kitāb 'Ibṭāl al-Istiḥsān," in Kitāb al-'Umm by idem (Būlāq ed.), 7:267-277, pp. 270-271 (34), 272 (14); 'Abū Zahrah, Ash-Shāfi^{c}ī, pp. 299-301.

[2]See at-Turkī, pp. 434, 559, 561-562, 573, 576.

sampling and an adequate enumeration of examples. This same requirement can be applied to the use of analogical reasoning in law, especially when--as is the case in much of Islamic law--many precepts are arrived at on the basis of historical reports of the application of those precepts to earlier precedents. For one cannot arrive at the true signifying analogy of a ruling until one has understood the full scope of the precept to which it pertains. This creates a special problem in the case of analogical reasoning that is based on precepts of law that have been constructed only on the basis of a few isolated ḥadīth, because of the possibility that the full scope of the precepts may not have been fully or adequately reflected in those reports, even if they are authentic.[1]

It is worthy of note in this regard that ash-Shāfi^{c}ī is aware of the conjecture implicit in reasoning on the basis of isolated ḥadīth. He indicates in "Jimā^{c} al-^{c}Ilm", for example, that the distinctive position of "'ahl al-ḥadīth" [the proponents of ḥadīth] is that they accept isolated ḥadīth [khabar al-khāṣṣah] as a valid basis of analogy and legal reasoning, which places them in opposition, he continues, to those who would have only definitive knowledge [al-'iḥāṭah] in their reasoning. Ash-Shāfi^{c}ī then continues to say that his opponent regards 'ahl al-ḥadīth to be

[1]See earlier discussion above, pp. 137-140.

mistaken because of their acceptance of isolated ḥadīth, and he continues to say:

> The most knowledgeable of people in fiqh in our opinion [ᶜindanā] and in the opinion of most of them [i.e. 'ahl al-ḥadīth] are those who adhere to ḥadīth most closely. Yet [in your opinion] these are the most ignorant [of people in fiqh]['ajhaluhum], because ignorance [al-jahl] in your opinion is tantamount to accepting isolated ḥadīth [khabar al-infirād].[1]

It is also significant that ash-Shāfiᶜī in this same discussion states that there are theoretical differences of this nature within every city; he cites examples of such differences within Makkah, Madīnah, and Kūfah.[2]

Ash-Shāfiᶜī does not claim that following isolated ḥadīth and making qiyās on the basis of them will lead to definitive knowledge [al-'iḥāṭah and ᶜilm al-'iḥāṭah]. Rather he draws a distinction between ᶜilm aẓ-ẓāhir [knowledge based on apparent meanings], which is the type produced by isolated ḥadīth, and ᶜilm al-'iḥāṭah.[3] ᶜIlm al-'Iḥāṭah is possible, he holds, however, when the signifying analogies of precepts are set forth explicitly in authoritative legal texts or when a ruling in an authoritative legal text is applied directly to matters that fall within the scope of the text itself.[4]

Ash-Shāfiᶜī's position, rather, is that despite the conjecture implicit in following isolated ḥadīth it is a

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[1]Ash-Shāfiᶜī, "Jimāᶜ al-ᶜIlm," p. 256 (30).

[2]Ibid., p. 256 (34).

[3]Abū Zahrah, Ash-Shāfiᶜī, pp. 298-299. [4]Ibid., p. 310.

matter of religious duty that one follow them in the absence of stronger and more explicit legal texts. It is part of man's duty to obey God, Who has not left him at liberty to follow his personal whims, and, as it were, a matter of worship. Similarly, for ash-Shāfi^{c}ī, to reach a legal decision on the basis of something other than an explicit legal text [khabar] or qiyās upon a khabar is much closer to sinfulness ["'aqrab 'ilā 'l-'ithm"] than erring on the basis of following conjectural texts. Legal reasoning, he asserts, must always be based directly or indirectly by qiyās on an "^{c}ain qā'imah" [a standing or conspicuous source], and he defines the ^{c}ain qā'imah as a legal text in the Qur'ān or ḥadīth.[1]

Ash-Shāfi^{c}ī's reasoning in this regard is tied closely to his rejection of istiḥsān, sadd adh-dharā'i^{c}, and other types of legal reasoning that are not based on explicit legal texts but, as I will show, on principles of law.[2] (In fact, the conclusions of such types of reasoning tend to be contrary to explicit legal texts.) Ash-Shāfi^{c}ī describes such reasoning as arbitrary and impermissible. He describes sadd adh-dharā'i^{c}, which he refers to as "adh-dharā'i^{c}", as forbidden [ḥarām] because it contradicts the apparent [ẓāhir] meaning of legal texts.[3] Reasoning of this nature is imper-

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[1]See 'Abū Zahrah, Ash-Shāfi^{c}ī, pp. 298-301.

[2]See below, pp. 245-279.

[3]See Ash-Shāfi^{c}ī, "Ibṭāl al-Istiḥsān," pp. 269 (15), 270 (10). One should take note of the fact that these parts of "Ibṭāl al-Istiḥsān," like much of that work, are directed

missible, ash-Shāfi^{c}ī reasons, because it amounts to following something "which one devises that has no earlier precedent" ["fa'inna 'l-qawl bi-mā 'stahsana shai' yuhdithuhū lā ^{c}alā mithāl sabaqa"].[1] He describes istiḥsān and similar types of reasoning as following "what comes to one's mind" ["mā khaṭara ^{c}alā qulūbinā"], and, hence, because it is utterly subjective, it provides no objective criterion--such as are provided in the case of explicit legal texts--in terms of which others may differentiate between which of such opinions are right and wrong.[2] Thus, ash-Shāfi^{c}ī reasons, if permission is given to one person to perform this type of purely subjective reasoning in matters of law, permission must also be extended to others to arrive at opposite conclusions on the same basis.[3]

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against the Mālikīs, who rely heavily upon both sadd adh-dharā'i^{c} and istiḥsān. Hence, the work clearly is not directed exclusively against the Kūfans, as the title of the work with its attention on istiḥsān might lead one to expect.

The examples of sadd adh-dharā'i^{c} that ash-Shāfi^{c}ī refers to, especially in matters of buying and selling, where Mālik applies sadd adh-dharā'i^{c} extensively, are distinctively Mālikī. It is also noteworthy that ash-Shāfi^{c}ī cites elsewhere ash-Shaibānī's arguments against sadd adh-dharā'i^{c}. Although ash-Shāfi^{c}ī concedes that he cannot agree with Mālik ["ṣāḥibinā"] on that principle, he adds that ash-Shaibānī's argumentation can also be used against him; idem, "Ar-Radd ^{c}alā Muḥammad ibn al-Ḥasan," p. 300 (20).

[1]Ash-Shāfi^{c}ī, Risālah, p. 25.

[2]Idem, "Jimā^{c} al-^{c}Ilm," p. 253 (12); cf. idem, "Ibṭāl al-Istiḥsān," pp. 272 (14), 273 (4).

[3]Idem, "Ibṭāl al-Istiḥsān," p. 273 (31).

On the one hand, ash-Shāfi^{c}ī's insistence that all legal reasoning must be based on explicit legal texts and his rejection of other types of legal reasoning is, as ad-Dawālībī has observed, interestingly parallel to the later theological doctrine of al-'Ash^{c}arī,[1] which later gained wide acceptance among Shāfi^{c}īs, that good [al-ḥusn] and evil [al-qubḥ] are known only through revelation and revealed law [ash-shar^{c}], not through reason [al-^{c}aql].[2] On the other hand, it reflects a type of strict, deductive reasoning--as opposed to inductive reasoning--that seems to characterize ash-Shāfi^{c}ī's thought and which later made the legal theory of his school, I believe, especially well-suited for being treated in terms of the type of syllogistic reasoning exemplified in the works of the most renowned Shāfi^{c}ī legal theorists like al-Juwainī, al-Ghazālī, al-Āmidī, and Fakhr-ad-Dīn ar-Rāzī.[3]

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[1] 'Abū 'l-Ḥasan ^{c}Abd-Allāh ibn 'Ismā^{c}īl AL-'ASH^{c}ARĪ (260-324/874-935) was born in Baṣrah and was one of the main students of the famous Baṣran mu^{c}tazilī al-Jubbā'ī. Around the age of forty, however, al-'Ash^{c}arī turned against the teachings of al-Jubbā'ī and mu^{c}tazilī kalām in general; he then began to use his skills as a dialectician to defend, as he claimed, the theological positions of 'ahl as-sunnah, as reflected, for example, in the teachings of 'Aḥmad ibn Ḥanbal. Contemporary and later Ḥanbalīs in general, however, did not accept 'Ash^{c}arī kalām as valid. The 'Ash^{c}arī school, which spread widely among Shāfi^{c}īs, became one of the most influential intellectual traditions in the sunnī community. See Sezgin, 1:602.

[2] Ad-Dawālībī, p. 174; see also below, p. 270.

[3] 'IMĀM AL-ḤARAMAIN ^{c}Abd-al-Malik ibn ^{c}Abd-Allāh AL-JUWAINĪ (419-478/1028-1085), one of the most renowned Shāfi^{c}ī legal theorists and mutakallim's, was born near

With regard to the systematically deductive manner of ash-Shāfi^{c}ī's thought, it is worth pointing out that ash-Shāṭibī, himself a strong advocate of inductive as opposed to rigorously deductive thinking, holds that the earliest fuqahā' tended to reason in what is essentially an inductive manner, arriving at an understanding of the overall scope and purpose of the precepts and principles of Islamic law by contemplating the meanings of its combined sources in their totality. Only by such inductive thinking, ash-Shāṭibī reasons, can one discover and prove conclusively the precepts and principles of Islamic law. There are no explicit texts, he observes, for many of the most fundamental principles of Islamic law. Thus, one would be at a loss

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Nīsāpūr; moved later to Baghdād; then spent several years teaching in the sanctuaries [ḥaramain] of Makkah and Madīnah; and finally returned to Nīsāpūr. Niẓām-al-Mulk, the famous Ghaznavid administrator, admired al-Juwainī greatly and is said to have built the Niẓāmīyah academy in his honor. Al-Juwainī was a teacher of al-Ghazālī. See Ziriklī, 4:306.

'Abū Ḥāmid Muḥammad ibn Muḥammad AL-GHAZALĪ (450-505/1058-1111) hailed from Khurāsān but travelled extensively, living in Baghdād, the Ḥijāz, Syria, and Egypt. He is regarded highly as a Shāfi^{c}ī legal theorist and compiled numerous works in a wide variety of fields, including philosophy, logic, and kalām. See Ziriklī, 7:247-248.

Saif-ad-Dīn ^{c}Alī ibn 'Abī ^{c}Alī AL-ĀMIDĪ (551-631/1156-1233) was born in Āmid in Turkey; moved later to Baghdād; travelled to Syria and Egypt; and died in Damascus. Initially a Ḥanbalī, al-Āmidī adopted the Shāfi^{c}ī school; his 'Iḥkām is among the most highly regarded Shāfi^{c}ī works on legal theory. He was noted also as a logician, philosopher, and mutakallim, like al-Juwainī, al-Ghazālī, and ar-Rāzī. See Kaḥḥālah, 7:155-156.

FAKHR-AD-DĪN Muḥammad ibn ^{c}Umar AR-RĀZĪ (544-606/1150-1210) was born in Ray; travelled to Khurāsān, Khwārazam, and Transoxiana; and died in Afghanistan. He is noted as a Qur'ānic commentator and Shāfi^{c}ī legal theorist and mutakallim; he also had excellent knowledge of Persian literature; See Ziriklī, 7:203.

to try to arrive at them deductively and to prove them by that manner of reasoning to be conclusive. They are borne out clearly by inductive thinking, however, which combines the explicit and implicit meanings of a wide variety of textual references and early precedents. Later fuqahā', he holds, lost this inductive method. In the rigorously deductive literalism that followed, they would often seek, for example, to establish and prove by deduction from explicit texts the precepts of principles of Islamic law. Because of the conjecture, however, that is attached to isolated texts, it became impossible for them to deduce conclusively the validity of even some of the most fundamental precepts and principles of Islamic law. Finally, in light of this, ash-Shāṭibī recommends to his readers that they seek out and study the earliest works of law, since he believes that one finds in them a much clearer understanding of the overall principles of Islamic law and a sounder application of it in terms of its ultimate objectives.[1]

It remains to consider the last two differences which I have mentioned between ash-Shāfiᶜī's concept of qiyās and that of 'Abū Ḥanīfah and Mālik, namely, the authority he gives it and the attitude he takes regarding qiyās and other modes of ijtihād. For ash-Shāfiᶜī, qiyās is the least authoritative of the sources and principles of law to which he

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[1]See ash-Shāṭibī, Al-Muwāfaqāt, 1:42-61.

subscribes. In the absence of a directly applicable legal text, one must resort, according to ash-Shāfi^{c}ī, to qiyās on the basis of the most analogous text, but one does not perform qiyās in contradiction to a legal text that is directly applicable.[1] In this regard 'Aḥmad ibn Ḥanbal is much like ash-Shāfi^{c}ī, for Ibn Ḥanbal resorts to qiyās only when it is absolutely necessary and prefers to follow the text of a ḥadīth the 'isnād of which is less than sound rather than resort to qiyās.[2]

It is a significant point of difference, however, between ash-Shāfi^{c}ī and 'Abū Ḥanīfah and Mālik. One of the distinctive features of the concepts of qiyās of 'Abū Ḥanīfah and Mālik, about which more will be said shortly, is that they perform qiyās on the basis of well-established legal texts and precepts of law. They give priority to the conclusions of qiyās of this sort over isolated ḥadīth. Furthermore, both draw exceptions to qiyās on the basis of istiḥsān, and, for Mālik, the principles of sadd adh-dharā-'i^{c} and al-maṣāliḥ al-mursalah also take priority over qiyās. Mālik also performs qiyās on the basis of earlier conclusions of qiyās, without regarding it as necessary to go back to the original analogy. He also regards it as valid to render general statements in the Qur'ān specific by

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[1]See 'Abū Zahrah, Mālik, p. 273, and idem, Ash-Shāfi^{c}ī, pp. 298-301.

[2]At-Turkī, pp. 573, 576.

means of qiyās.[1]

Finally, ash-Shāfi^{c}ī makes it quite clear that he regards qiyās to be the only valid mode of ijtihād, as has been indicated to some extent already by the preceding discussion.[2] This sets him apart from 'Abū Ḥanīfah, who also relies upon istiḥsān, and it makes him very distinctly different from Mālik, who relies on istiḥsān, sadd adh-dharā-'i^{c}, and al-maṣāliḥ al-mursalah along with qiyās and apparently regards them to be more authoritative than qiyās as well.

Mālik and 'Abū Ḥanīfah: Reasoning on the Basis of Legal Precepts

Mālik and 'Abū Ḥanīfah, like ash-Shāfi^{c}ī and Ibn Ḥanbal, also will reason directly and by way of analogy from authoritative legal texts such as ḥadīth and Qur'ānic verses.[3] But, what is more distinctive about their legal

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[1]See below, pp. 241-245.

[2]See ash-Shāfi^{c}ī, Risālah, pp. 39, 25; idem, "Jimā^{c} al-^{c}Ilm," pp. 252 (10) [here ash-Shāfi^{c}ī refers to a more extensive treatment of qiyās of his in "his book", which is probably a reference to his Risālah, indicating that "Jimā^{c} al-^{c}Ilm" was written afterwards.], 253 (12, 17, 23), 254 (3), 258 (6) [here ash-Shāfi^{c}ī's opponent asks him on what basis he has prohibited others to use anything but qiyās.]; idem, "Ibṭāl," pp. 270-271 (34), 272 (14); and 'Abū Zahrah, Ash-Shāfi^{c}ī, pp. 298-301.

[3]See, for example, Muwaṭṭa', 2:772, 789 [In the second example, p. 789, Mālik reasons analogically on the basis of a ḥadīth pertaining to the emancipation of slaves that he has cited in the first example, p. 772.]; 1:105 [Mālik reasons directly on the basis of a ḥadīth.]; 2:541 [Mālik ex-

reasoning, I believe, is that they often formulate statements of general precepts of Islamic law and then reason directly or by analogy from those precepts.[1] In the case of 'Abū Ḥanīfah, these general precepts are often authoritative legal texts themselves, such as ḥadīth, which are

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tends the application of a Qur'ānic verse by explaining the implications of the word "'iḥṣān" [the state of being married], which the verse contains.]; and 'Abū Zahrah, 'Abū Ḥanīfah, p. 325; Zakī-ad-Dīn Sha^{c}bān, pp. 149-153.

[1]It is important for me to distinguish here between what I mean by "legal precepts" and "legal principles". The distinction which I have in mind is that which is drawn in Islamic legal theory between "qā^{c}idah fiqhīyah" [principle of fiqh], for which I use "legal precept", and "qā^{c}idah 'uṣūlīyah" [principle of legal theory], for which I use "legal principle".

Legal precepts [i.e. al-qawā^{c}id al-fiqhīyah] are general statements of the principles, stipulations, pre-conditions, regulations, and so forth that pertain to the application of specific branches of law, such as the laws of inheritance, marriage, contracts, punishments, and so forth. An example of a precept, then, is Mālik's position, which I will discuss later in this chapter, that "inheritance is to be distributed only on the basis of certainty."

Legal principles [i.e. al-qawā^{c}id al-'uṣūlīyah], on the other hand, are more general statements that pertain to the application of Islamic law in general and are not limited to particular branches of law. A principle, for example, is the statement, "lā ḍarar wa lā ḍirār" [there is no validity in a ruling that brings excessive harm to oneself or to others] and, similarly, the principle of "raf^{c} al-ḥaraj" [lit., removing excessive difficulty], by which is meant that regulations must not be imposed upon people that are beyond their capacity to observe.

The words "qā^{c}idah" and "'aṣl" are often used in works of fiqh and legal theory to stand for both precepts and principles. The word "ḍābiṭ", however, is generally applied to precepts. "Qānūn" and "qawānīn" are used in this sense in the work of the Mālikī faqīh Muḥammad ibn 'Aḥmad ibn Juzaiy (693-741/1294-1340), Al-Qawānīn al-Fiqhīyah. Similarly, ^{c}Izz-ad-Dīn ibn ^{c}Abd-as-Salām's famous work Qawā^{c}id al-'Aḥkām, al-Qarāfī's Furūq, Ibn an-Nujaim's Al-'Ashbāh wa 'n-Naẓā'ir, and Ibn Rajab's Al-Qawā^{c}id are devoted to legal precepts, not legal principles, although they may touch on them. See Muṣṭafā Sa^{c}īd al-Khinn, 'Athar al-Ikhtilāf fī 'l-Qawā^{c}id

part of the well-known sunnah and are those sorts of ḥadīth which 'Abū Yūsuf describes as having been recognized as valid by the fuqahā'.[1] In the case of Mālik, such precepts are sometimes set forth with no reference to ḥadīth or other textual sources of law. Generally, the non-textual source of Madīnan ᶜamal plays a conspicuous role in Mālik's determining the content and scope of the precepts to which he subscribes, and it is also in terms of Madīnan ᶜamal often that he establishes the authoritativeness of those precepts. In the example given earlier of Mālik's precept regarding how the harvests of date oases are to be sold, the ḥadīth in question provided only a small part of the overall precept.[2] It is also to be noted that the statements in the Muwaṭṭa' in connection with which Mālik uses his terms are usually set forth as such general legal precepts and often provide considerably more information than can be deduced from the textual references Mālik cites. Mālik reasons directly and by analogy from these precepts even within the Muwaṭṭa'.[3] In the case of his sunnah terms, however, they

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al-'Uṣūlīyah fī 'Khtilāf al-Fuqahā' ([Egypt]: Mu'assasat ar-Risālah, 1392/1972), p. 37, note 2; and Mahmassani, p. 151.

[1]See above, pp. 174-175; and 'Abū Zahrah, 'Abū Ḥanīfah, pp. 325, 337-339; Zakī-ad-Dīn Shaᶜbān, pp. 149-153.

[2]See above, pp. 135-144.

[3]See below, pp. 619-621, 673, 693-694, 703, 740, 743-744, 750-751.

often stand for precepts that Mālik regards not to be analogous to related matters and, hence, are to be restricted to the matters to which they originally pertained, without being extended to other matters by analogical reasoning.[1] Because of the nature of the general precepts it contains, the Muwaṭṭa' is, as I suggested earlier, a source book of the basic precepts of the Madīnan school upon which ijtihād is to be done.

Reasoning on the basis of legal precepts is not different in essence from reasoning on the basis of specific legal texts in the original sources, although it may have several practical advantages over reasoning on the basis of original texts, if the legal precepts are set forth accurately, comprehensively, and unambiguously. Those who reason from specific original texts--ash-Shāfi^{c}ī's ^{c}ain qā'imah--regard the texts themselves to be adequate reflections of the legal precepts to which they pertain, such that the information presented in those texts does not need to be complemented by reference to additional sources of law. This involves presumptions--such as ash-Shāfi^{c}ī makes--that legal texts in the Qur'ān and ḥadīth will be presumed to be unabrogated until shown to have been abrogated in other textual sources; that they will be presumed to be of general applicability until proof of specification has been established in other textual sources; and--perhaps most impor-

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[1]See below, p. 423.

tant of all--that the textual sources upon which one relies provide in themselves a sufficiently authentic, comprehensive, and unambiguous portrayal of the original precepts to which they pertain.[1]

When a precept has been set forth, however, the faqīh reasons from it deductively in the same manner one would reason from a specific legal text in the original sources. He applies it directly; that is to say, he applies it to matters that fall directly under the general provisions of the text of the precept. Similarly, he may apply the precept indirectly by analogy to other matters that, although similar to the precept, do not fall directly under its general provisions.

Thus, in evaluating the difference between legal reasoning based on precepts which the faqīh himself sets forth and legal reasoning based directly on specific texts of law in the original sources, the key considerations, on the one hand, are how authentically and accurately the faqīh has arrived at his precepts--i.e. how authoritative they are--and, furthermore, how comprehensive and unambiguous the language is in which he has stated the precept. And, on the other hand, one would have to consider the question of the adequacy of the legal texts of the original sources to meet these same considerations.

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[1]See above, p. 140.

Thus, for example, whenever the original precepts of Islamic law are not adequately reflected in the original sources, as in the case of some isolated ḥadīth which are ambiguous or have other textual deficiencies, the elaboration of those precepts on the basis of the well-known sunnah, the ᶜamal of the Companions and prominent fuqahā' of the early generations, and a variety of textual and non-textual sources of law provides a broader, more inductive basis, as it were, upon which to establish the original content of the law. There is an immense practical advantage, furthermore, in setting forth such precepts in comprehensive and clear legal language, since that insures that other fuqahā' will apply the precept correctly. A good illustration of this is the example I cited earlier of Mālik's elaboration of the precept pertaining to ruling on the basis of the testimony of a single witness. The legal texts Mālik cites provide none of the important details of the precept, which Mālik himself provides on the basis of Madīnan ᶜamal, namely, what procedure is to be followed and the stipulation that this precept pertains exclusively to matters of buying and selling and not to questions of marriage, divorce, libel, criminal punishments, and so forth.[1]

Another practical advantage that comes from the full elaboration of legal precepts, as long as they are elaborated accurately, is that the signifying analogies of those

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[1]See above, pp. 141-143.

precepts are sometimes articulated clearly, whereas they may only be hinted at in the original sources or there may be no indication of them at all. Such articulation of the signifying analogies behind precepts, of course, facilitates the application of analogical reasoning greatly. For example, Mālik cites in the Muwaṭṭa' a report that ᶜAlī ibn 'Abī Ṭālib sold a male camel of his named ᶜUṣaifīr for twenty other camels [baᶜīr]. Similarly, another report has it that ᶜAbd-Allāh ibn ᶜUmar once bought a riding camel [rāḥilah] for four camels [baᶜīr] which he was to deliver at a certain place on a later date. Mālik then explains the pertinent precept on the basis of Madīnan ijtimāᶜ [AMN]; such transactions are permissible--i.e. they are not contrary to the Islamic prohibition of ribā [usury]--if the uses of the animals which are exchanged are clearly different, such as between war camels and pack camels, even though they be of the same species. Similarly, he continues, such exchanges are prohibited if the uses of the animals exchanged are similar, even if their species be different.[1] Having articulated the signifying analogy of this precept, Mālik points out elsewhere in the Muwaṭṭa' that that same signifying analogy holds in the case of the exchange of various types of metals, different agricultural products, and so forth, many of which transactions are also part of Madīnan ᶜamal.[2]

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[1]Muwaṭṭa', 2:652-653. [2]Ibid., 2:661, 662, 610.

One of the clearest examples I have found of Mālik's reasoning on the basis of legal precepts is that of his reasoning on the basis of the precept, which he sets forth in the Muwaṭṭa' and takes from Madīnan 'ijmā^c, that inheritance is never to be distributed on the basis of doubt but only on the basis of certain knowledge ["lā yanbaghī 'an yaritha 'aḥad 'aḥadan bi-'sh-shakk, wa lā yarithu 'aḥad 'aḥadan 'illā bi-'l-yaqīn min al-^cilm wa 'sh-shuhadā'"].[1] Mālik cites various applications of this principle in Madīnan ^camal regarding matters like the inheritance of relatives killed in battle and the rights and limitations of illegitimate children to inherit from their fathers when their real fathers are not known.[2] Ibn al-Qāsim refers to this precept repeatedly in the Mudawwanah in accounting for Mālik's reasoning on a number of directly related questions and also in arriving at answers himself on other questions. In fact the particulars of some chapters on inheritance in the Mudawwanah virtually revolve around this precept.[3]

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[1]Muwaṭṭa', 2:521. The certainty in question here pertains to matters like certainty of kinship and the order of death of one's kinsmen. According to Islamic law, inheritance is distributed according to set formulas to marital partners and kinsmen, beginning with marital partners and the nearest of kin. Since kinsmen have mutual rights of inheritance and since they receive different proportions according to their nearness in kin, the order in which kinsmen die--say, for example, on the battle field--can effect the size of the proportions of their estates the remaining kinsmen ultimately receive.

[2]Ibid., 2:520-522, 741. [3]Mudawwanah, 3:81-85.

The precept Mālik has set forth in this example is in fact the signifying analogy behind the procedure followed on several occasions in the ᶜamal of Madīnah, which he cites in the Muwaṭṭa', according to which the people of Madīnah distributed inheritance to the survivors of various early battles in which they took part.[1] It should be noted that once this signifying analogy has been articulated in the universal manner in which Mālik has articulated it, one can solve numerous questions by direct reference to the precept itself--as Mālik and Ibn al-Qāsim do--without having to refer back to the original analogy. Although its conclusions are analogical to the original precedent, such reasoning is not, strictly speaking, analogical reasoning. Rather it is direct application of the precept in question. This is an illustration, I believe, of how the universal wording of precepts facilitates the practical application of the law.

Some Special Characteristics of Mālik's Concept of Qiyās

The specification of Qur'ānic verses by qiyās

As I mentioned earlier, general statements in the Qur'ān are regarded in Mālikī legal theory to be of the same nature as ẓāhir statements, which Mālikīs regard as being of conjectural meaning. One of the implications of this position is that Mālikīs regard it as valid to render

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[1] Muwaṭṭa', 2:520.

the general meanings of Qur'ānic verses specific by a wide variety of legal sources and principles.[1]

According to Mālikī legal theory the dictates of those types of qiyās which are based upon well-established precepts of law take priority over the conjectural meanings of Qur'ānic verses of general or otherwise ambiguous wording. Thus, such Qur'ānic statements may be rendered specific or otherwise clarified by reference to these types of qiyās.[2]

Mālikī legal theory differs in this regard from Ḥanafī and Shāfi^{c}ī legal theory. As I pointed out earlier, Ḥanafī theory regards general statements in the Qur'ān to be of definitive meaning, which leads to the unique Ḥanafī position on the specification and abrogation of Qur'ānic verses. Hence, according to ^{c}Īsā ibn 'Abān and al-Karkhī, 'Abū Ḥanīfah does not permit general Qur'ānic verses to be specified by qiyās. However, once the specification of such verses has been established by other sources of law, he permits the full extent of the specification to be elaborated by means of qiyās.[3] As for ash-Shāfi^{c}ī, qiyās always is secondary to specific legal texts; hence, he does not re-

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[1]See above, pp. 151-154.

[2]'Abū Zahrah, Mālik, pp. 345, 272-274 [where he cites from al-Qarāfī on this matter.]

[3]See above, pp. 149-151.

gard it to be legitimate to use qiyās as a means of rendering general Qur'ānic texts specific.[1]

The following example, according to Ibn Rushd, is an illustration of Mālik's specifying the meaning of a Qur'ānic verse by reference to qiyās made on the basis of other well-established precepts of law. According to the Islamic law of divorce, a husband has the right to initiate the divorce of his wife twice, on which occasions he also has the right to take her back as his wife during the waiting period [ᶜiddah], which is usually three menstrual cycles. If, however, he has not taken her back during this period, she will be formally divorced from him upon its conclusion. A pertinent Qur'ānic verse says that when wives have neared completion of their waiting periods their husbands should either take them back or separate from them in an equitable manner. It adds, "And call to witness two just [ᶜadl] [men] from among you . . .".[2]

The ẓāhir meaning of this verse, Ibn Rushd holds, would indicate that it is required for the husband to call two just witnesses whether he takes the wife back or separates from her. If the man takes his wife back, however, Mālik regards it not obligatory but recommended that he call witnesses. Mālik concludes that the calling of witnesses is not obligatory, Ibn Rushd states, by analogy with

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[1]'Abū Zahrah, Mālik, p. 273. [2]Qur'an, 65:2.

other precepts of Islamic law according to which a person who reclaims something that is rightfully his is not required to call witnesses.[1]

Rejection of isolated ḥadīth
on the basis of qiyās

Another distinctive characteristic of Mālik's conception of qiyās, according to both Mālikī and non-Mālikī legal theorists, is that he rejects isolated ḥadīth with sound 'isnād's, when their meanings are contrary to the implications of qiyās made on the basis of well-established precepts of law and there are no other well-established precepts to which they conform.[2] According to the Mālikī legal theorist 'Abū Bakr ibn al-ᶜArabī, Mālik's rejection of the ḥadīth about washing seven times the pot in which a dog has

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[1]Ibn Rushd, 2:51 (17).

[2]See 'Abū Zahrah, Mālik, p. 345; al-Qarāfī, 1:119-120; Ash-Shāṭibī, Al-Muwāfaqāt, 3:24; Muḥammad ibn 'Aḥmad AS-SARAKHSĪ, Kitāb al-'Uṣūl, ed. 'Abū 'l-Wafā' al-'Afghānī, 2 vols. in 1 (Ḥaidarabad: Lajnat 'Iḥyā' al-Maᶜārif an-Nuᶜmānīyah, 1372/1953), 1:338-339; ᶜUbaid-Allāh ibn ᶜUmar AD-DABŪSĪ, Ta'sīs an-Naẓar (Cairo: Zakarīyā ᶜAlī Yūsuf, 1972), p. 65; Muḥammad ibn ᶜAbd-al-Wāḥid IBN AL-HUMĀM, At-Taḥrīr fī 'Uṣūl al-Fiqh al-Jāmiᶜ bain Iṣṭilāḥai 'l-Ḥanafīyah wa 'sh-Shāfiᶜīyah, in Taisīr at-Taḥrīr by Muḥammad 'Amīn 'AMĪR BĀDISHĀH, 4 vols. in 2 (Egypt: Muṣṭafā al-Bābī al-Ḥalabī, 1350-1351/[1931-1932]), 3:116; Āl Taimīyah [i.e. ᶜAbd-as-Salām ibn ᶜAbd-Allāh IBN TAIMĪYAH, ᶜAbd-al-Ḥalīm ibn ᶜAbd-as-Salām IBN TAIMĪYAH, and 'Aḥmad ibn ᶜAbd-al-Ḥalīm IBN TAIMĪYAH], Al-Musawwadah fī 'Uṣūl al-Fiqh, ed. Muḥammad Muḥyī-ad-Dīn ᶜAbd-al-Ḥamīd (Cairo: Maṭbaᶜat al-Madanī, 1964), p. 239; 'ABU'L-ḤUSAIN Muḥammad ibn ᶜAlī AL-BAṢRĪ, Kitāb al-Muᶜtamad fī 'Uṣūl al-Fiqh, ed. Muḥammad Ḥamīd-Allāh, 2 vols. (Damascus: Al-Maᶜhad al-ᶜIlmī al-Fransī li-'d-Dirāsāt al-ᶜArabīyah, 1384/1964), 2:655; Ash-Shāfiᶜī, "Ikhtilāf Mālik," pp. 211-212.

licked is an instance of Mālik's application of this principle, as pointed out earlier.[1]

This principle is clearly contrary to the legal theory of ash-Shāfi^{c}ī, who regards isolated ḥadīth with sound 'isnād's to be a valid independent source of law regardless of how anomalous their meanings may appear to be in the light of other well-established precepts. It is interesting, however, that the Ḥanafī legal theorists ad-Dabūsī, as-Sarakhsī, and Ibn al-Humām,[2] despite 'Abū Ḥanīfah's attitude toward isolated ḥadīth, regard this principle also to be a point of difference between Mālik and 'Abū Ḥanīfah.[3]

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[1]See above, pp. 182-183.

[2]'ABŪ ZAID ^{c}Abd-Allāh ibn ^{c}Umar AD-DABŪSĪ (367 [?]-430/977[?]-1039) was a very significant Ḥanafī faqīh and legal theorist from Dabūsīyah in Transoxiana and died in Bukhārā. He is said to have been the first to bring ^{c}ilm al-khilāf [the science of the theoretical bases of the differences of legal opinions among the schools] into existence; his Ta'sīs an-Naẓar is devoted to this subject. Ad-Dabūsī's Taqwīm al-'Adillah and Al-'Asrār are among the most important Ḥanafī works on legal theory. Ziriklī, 4:248.

SHAMS AL-'A'IMMAH Muḥammad ibn 'Aḥmad AS-SARAKHSĪ (d. 483/1090) was a famous Khurāsānian Ḥanafī faqīh and legal theorist and qāḍī. His thirty volume Mabsūṭ is one of the most renowned compendia on Ḥanafī fiqh and legislative method [tashrī^{c}]. Similarly, his 'Uṣūl is among the greatest Ḥanafī works on legal theory. He did much of his compendious writing while in prison. Ziriklī, 6:208.

Muḥammad ibn ^{c}Abd-al-Wāḥid IBN AL-HUMĀM (790-861/1388-1457) was born in Alexandria and grew up in Cairo. He lived for sometime in Ḥalab in Syria but died in Cairo. Ibn al-Humām was one of the greatest Egyptian Ḥanafī fuqahā' and legal theorists. He also had extensive knowledge of logic, mathematics, music, Arabic language and literature, and Qur'ānic commentary. Ziriklī, 7:134-135.

[3]Ad-Dabūsī, p. 65; as-Sarakhsī, 1:338-339; Ibn al-Humām, 3:116.

Ad-Dabūsī, in fact, singles this out as the principle difference between Mālik and 'Abū Ḥanīfah.[1] This is somewhat perplexing in light of the position of Ḥanafī legal theorists, as set forth by al-Kawtharī and others, that 'Abū Ḥanīfah rejects isolated ḥadīth when they are contrary to the well-established precepts of law to which he subscribes.[2]

I am not sure how to account for this contrariness. It could be, of course, that it is simply a contradiction. However, I believe that it can be accounted for in terms of the general principles of Ḥanafī qiyās as set forth by 'Abū Zahrah and the closely related Ḥanafī concept of istiḥsān as-sunnah, both of which merit further research. According to 'Abū Zahrah, 'Abū Ḥanīfah does not reject all isolated ḥadīth that are contrary to well-established precepts. Rather, he will give them limited acceptance, if he regards their 'isnād's to be sound. What this means is that he will accept such ḥadīth but limit their application strictly to the specific subject matter to which they pertain. He will regard them to be exceptions from qiyās and, hence, invalid as the basis of qiyās in matters related to them. He will continue to do qiyās on the basis of the pertinent well-established principles. For example, 'Abū Ḥanīfah accepts the isolated ḥadīth of 'Abū Hurairah that the Prophet stated that one has not broken one's fast by eating or drinking

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[1]Ad-Dabūsī, p. 65. [2]See appendix 1.

during the fast out of forgetfulness. This ḥadīth is contrary to 'Abū Ḥanīfah's precept that the fast is broken by sexual relationships during the fast or by anything reaching one's stomach. In light of this ḥadīth he makes an exception only in the case of one's breaking one's fast out of forgetfulness but not when one breaks one's fast by virtue of other types of mistakes.[1] It is reported that 'Abū Ḥanīfah stated, regarding this ḥadīth, "Were it not for [this ḥadīth's] having been transmitted, I would have followed qiyās [in the matter]" ["law lā 'r-riwāyah, la-qultu bi-'l-qiyās"].[2]

'Abū Ḥanīfah's limited acceptance of isolated ḥadīth in such instances is very similar, if not identical, to a concept of Ḥanafī istiḥsān which Ḥanafī legal theorists call "istiḥsān as-sunnah". According to this type of istiḥsān, 'Abū Ḥanīfah draws exception in some matters to the strict application of qiyās where the application of qiyās would be inappropriate but cites isolated ḥadīth as the references or ancillaries for such istiḥsān.[3]

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[1] 'Abū Zahrah, 'Abū Ḥanīfah, pp. 325-326; cf. Zakī-ad-Dīn Sha^{c}bān, pp. 149-150, 153.

[2] Cited by Zakī-ad-Dīn Sha^{c}bān, p. 153.

[3] 'Abū Zahrah, Mālik, p. 355; az-Zarqā, 1:92. See further discussion of istiḥsān as-sunnah below, pp. 255-258.

Performing qiyās on the basis of earlier instances of qiyās

Another interesting and distinctive characteristic of Mālik's conception of qiyās is that he regards it as valid to make qiyās on the basis of the conclusions of earlier applications of qiyās. Ibn Rushd [al-Jadd] states that it is a matter of consensus among Mālikīs, according to what they have written in their books, that this type of qiyās is valid.[1] It is, however, another point of difference between the Mālikī concept of qiyās and the concept of the Ḥanafīs and Shāfi^{c}īs, who, although they may differ on what shall constitute the bases for qiyās, hold that one must always return to the original basis of the qiyās.[2]

Those types of qiyās upon which Mālik regards it as legitimate to perform qiyās, according to Ibn Rushd [al-Jadd], however, are only those that are conclusively sound. Hence, according to him, Mālikīs do not regard the conclusively sound conclusion of a qiyās to be a far^{c} [lit., branch; i.e. a derivative conclusion that has no independent validity in isolation from the basis from which it was derived]. Rather, Mālikīs regard the conclusions of a

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[1]Ibn Rushd [al-Jadd], 1:22-23; 'Abū Zahrah, Mālik, p. 348.

[2]See 'Abū Zahrah, Mālik, p. 348; idem, 'Abū Ḥanīfah, pp. 325, 337-339; cf. Zakī-ad-Dīn Sha^{c}bān, p. 118. (Sha^{c}bān claims mistakenly here that it is a point of consensus among all fuqahā' that, in performing qiyās, one must always return to the original analogy.)

conclusively sound qiyās to be an 'aṣl [lit. root or trunk; i.e. the basis for further deductions]. He continues to say that the term "far^{c}", from the Mālikī point of view, is applied only to those results of legal reasoning that lack conclusiveness and are still somewhat doubtful. Qiyās would not be permissible on the basis of the conclusions of inconclusive qiyās. Nevertheless, Ibn Rushd [al-Jadd] regards the position of non-Mālikī legal theorists to be mistaken, that qiyās can be performed only on the basis of precepts firmly established in the original sources of the Qur'ān, sunnah, and 'ijmā^{c}.[1]

A practical advantage of this method of qiyās, according to 'Abū Zahrah, is that it multiplies greatly the number of concrete precedents and parallels to which the mujtahid may refer in solving a given problem.[2] Although theoretically such conclusions of qiyās should share a signifying analogy with a well-established precept of law, the full implication of that signifying analogy as pertains to the case in question may not be readily apparent in the original precedent or precept. Nevertheless, its implications for the case in question may be quite clear in other analogical deductions. Similarly, Euclid's axioms imply the theorems of Euclidean geometry, and all sound geometric

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[1]Ibn Rushd [al-Jadd], 1:22-23.

[2]'Abū Zahrah, Mālik, p. 348.

formulations, however complex, can be accounted for in terms of this handful of axioms and theorems. Nevertheless, the complex formulations are not readily apparent in the axioms and theorems themselves; rather, they emerge gradually, as it were, by reference to other systematic deductions and closer parallels. Given the limitations of human imagination, it is unlikely that the more complex formulations could even be arrived at at all by reference only to the axioms and theorems.

The following is, I believe, an illustration of Mālik's application of qiyās on the basis of an earlier qiyās, which is based on the legal precept that it is not valid to make rulings contradicting rights due one's legal status as partner, wife, free, slave, etc. A polygamous husband, according to Mālik, must treat his wives equally in material things, and he must alternate the nights he spends with each of them on a regular and equal basis, spending only one night at a time with each. Each wife must have the husband's company for the night that is regularly hers whether she be free or slave, menstruating--in which case sexual intercourse would not be permissible--or not, whether she be healthy or sickly, whether she be sane or insane. If, for example, a man should make a marriage contract with a woman that he will not treat her equally in marriage with her co-wives, the contract will be annulled if brought to light before consummation of the marriage. If, however, the marriage

is consummated before the contract is brought to light, the marriage shall be valid, but the stipulation of unequal treatment, void. A wife may agree with her husband, however, that she not be given equal treatment. It can never be a contractual agreement, however. Thus, Mālik states that she has the right to retract that agreement at any time.[1]

Once Mālik was asked, however, whether the co-wives of a polygamous husband have the right to demand of their husband, upon his return from a journey during which he has taken one of his wives as his sole marital companion, that he now spend an equal amount of time with each of them to the exclusion of the wife who had accompanied him. Mālik reasons by analogy that they have no right to such a demand. Ibn al-Qāsim states that Mālik likened the demand of the co-wives to the case of a master who owns a slave who is half-free and has run away. Under usual circumstances the half-free slave would work alternately one day for himself and one day for his master until he earned his freedom. Upon the slave's return, however, his master demands that the slave be required to work continuously for him until he has compensated for the days of his absence. Mālik holds that the master has no right to make such a demand, for if it were executed it would be inconsistent with the half-slave's legal status. Rather, Mālik states, he would be in that case a full slave ["huwa 'idhan ᶜabd kulluhū"].

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[1] Mudawwanah, 2:195-199, 198 (25).

This, Ibn al-Qāsim states, is Mālik's ᶜillah [sic]; to deprive the wife who accompanied the husband of her right of equal cohabitation with her husband in his presence would be inconsistent with her legal status as his wife.[1]

Istiḥsān

Whereas a distinctive feature of Mālik's application of qiyās is that he bases it on well-established legal precepts, the type of reasoning Mālik follows in istiḥsān, sadd adh-dharā'iᶜ, and al-maṣaliḥ al-mursalah is based on principles of law to which Mālik subscribes.[2] Al-Qarāfī uses the term "istidlāl" [inference] to describe these types of ijtihād and to distinguish them from qiyās.[3] It is also noteworthy that these three types of Mālikī istidlāl are not only a common, if not the predominant, feature of Mālik's ijtihād; they are also more authoritative than qiyās. For, as will be seen, they take priority over qiyās whenever the conclusions they lead to are contrary to qiyās.

As indicated by earlier references, ash-Shāfiᶜī regards each of these principles of legal reasoning to be invalid and arbitrary.[4] 'Abū Ḥanīfah clearly rejects sadd

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[1]Mudawwanah, 2:198 (19).

[2]For the distinction between precepts and principles of law, see above, note 1, p. 227.

[3]Al-Qarāfī, 1:147-148.

[4]See above, pp. 220-222, p. 226, note 2.

adh-dharā'i^{c}.[1] Istiḥsān is a common feature of 'Abū Ḥanīfah's legal reasoning. It appears, however, that there may be a significant difference between the concept of Ḥanafī istiḥsān and that of Mālikī.[2] 'Abū Ḥanīfah's position on al-maṣāliḥ al-mursalah is not altogether clear. Although some hold that he did not subscribe to the principle, it may be, as Muṣṭafā az-Zarqā has suggested, that the Ḥanafī concept of istiḥsān aḍ-ḍarūrah [istiḥsān made on the basis of absolute necessity] is essentially the same thing.[3] At-Turkī claims that Ibn Ḥanbal subscribed to types of istiḥsān, sadd adh-dharā'i^{c}, and al-maṣāliḥ al-mursalah. His concept of sadd adh-dharā'i^{c} is quite strong and similar to the Mālikī. The Ḥanbalī concept of istiḥsān, however, is one of the least authoritative of the principles of law to which Ibn Ḥanbal subscribes, and, hence, notably different from the Mālikī concept. Similarly, the Ḥanbalī concept of al-maṣāliḥ al-mursalah is considerably less authoritative than the Mālikī, because it too may not take priority over explicit legal texts.[4]

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[1]See above, pp. 220-221, note 3, and below, pp. 264-265.

[2]See below, pp. 254-258. [3]See below, pp. 257-258.

[4]See at-Turkī, pp. 515, 461, 474, 414-416, 419, 424, 430-431, 434-436; cf. 'Abū Zahrah, Ibn Ḥanbal, pp. 297-328. See also below, pp. 262, 269.

Mālikī istiḥsān is a type of equity. It draws exception to the strict application of general legal precepts--directly or by analogy--whenever, because of special circumstances, the strict application of those precepts would lead to excessive difficulty, harm, or injury. Thus, the principle of istiḥsān overrules the application of general precepts in specific situations and marks off, as it were, the limits within which those general precepts were intended to be applied.[1] 'Abū Bakr ibn al-ᶜArabī defines Mālik's concept of istiḥsān as "putting aside the necessary consequences of a legal directive by way of making an exception to it or granting special licences [tarakhkhuṣ] because of the contradiction [muᶜāraḍah] of special circumstances."[2] Similarly, Ibn Rushd--ash-Shāṭibī does not specify which Ibn Rushd he is quoting--defines istiḥsān as "that principle which repudiates [ṭarḥ] qiyās whenever the strict application of qiyās will lead to excess [ghulūw] and exaggeration [mubālaghah]."[3] In Bidāyat al-Mujtahid, Ibn Rushd [al-Ḥafīd] defines Mālik's istiḥsān as "the consideration of maṣlaḥah and justice ["al-iltifāt 'ilā 'l-maṣlaḥah wa 'l-ᶜadl"]."[4]

According to the prominent early Egyptian Mālikī faqīh 'Aṣbagh,[5] Mālik used to say that istiḥsān constitutes

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[1]See ash-Shāṭibī, Al-Muwāfaqāt, 1:40; 4:205-206.

[2]Cited by idem, Al-Iᶜtiṣām, 2:320-321.

[3]Ibid., 2:321. [4]Ibn Rushd, 2:112 (15).

[5]'AṢBAGH ibn al-Faraj ibn Saᶜīd (d. 225/840) was one

nine tenths of knowledge.[1] In another report, Ibn Rushd--again unspecified--states that istiḥsān is more common than qiyās.[2] There can be no doubt to one who studies Mālik's legal opinions, especially in the Mudawwanah, where one finds most of the examples of Mālik's ijtihād, that he subscribed to the concept of istiḥsān and relied upon it heavily.[3]

Ash-Shāṭibī justifies istiḥsān on the grounds that it is a principle of Islamic law to make things as easy for the people as possible, while staying within the general dictates of the law, and that only those legal requirements can be valid which are within the capacity of the people to carry them out without undue difficulty. (This principle is known as "raf^{c} al-ḥaraj" [removing excess difficulty].) Hence, whenever, because of the circumstances of a special case, the strict application of a general precept will lead to unnecessary difficulty or harm or for other reasons will become legally and rationally impossible, the general precept must not be applied to those circumstances. According

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of the prominent Mālikī fuqahā' of Egypt in his generation. Ibn al-Mājishūn is reported to have said of him that Egypt had never brought forth the likes of 'Aṣbagh. Like 'Ashhab, he was one of the personal secretaries of Mālik's student Ibn Wahb. Ziriklī, 1:336.

[1]Cited by ash-Shāṭibī, Al-I^{c}tiṣām, 2:320.

[2]Cited ibid., 2:321.

[3]See citations below, pp. 258-261.

to ash-Shāṭibī, the special licenses provided for in the Qur-'ān and sunnah ['aḥkām ar-rukhaṣ]--such as the exemption of travellers from the obligation of fasting the fast of Ramaḍān while they are travelling--are manifestations of the principle that underlies istiḥsān.[1]

Ash-Shāṭibī repudiates the arguments of those who claim that istiḥsān is arbitrary because it constitutes a departure from the textual sources of Islamic law, and he argues that istiḥsān is no less a valid legal argument than qiyās.[2] The principle of istiḥsān, he holds, is necessary to insure that Islamic law is applied with fairness and justice and in a manner that is consistent with its overall purpose. He regards istiḥsān as "granting priority to a limited maṣlaḥah [maṣlaḥah juz'īyah] over a universally absolute legal directive [dalīl kullī]."[3] A policy of rejecting istiḥsān and adhering strictly to the dictates of general texts and precepts would lead necessarily, he holds, to the obliteration of many of the maṣāliḥ which it is the purpose of Islamic law to secure and would bring about mafāsid instead, which it is the purpose of Islamic law to obliterate.[4]

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 1:102. [2]Idem, Al-I^{c}tiṣām, 2:320.

[3]Idem, Al-Muwāfaqāt, 4:205-206; cf. 'Abū Zahrah, Mālik, p. 357.

[4]Ash-Shāṭibī, Al-Muwāfaqāt, 1:100-102; 4:205-206.

According to 'Abū Bakr ibn al-ᶜArabī, Mālik performed istiḥsān on the basis of four considerations: 1) local customs [al-ᶜurf], 2) maṣlaḥah, 3) 'ijmāᶜ, and 4) the principle of rafᶜ al-ḥaraj and of making things easy for the people.[1] It would appear, however, that there is overlapping in this definition. As I mentioned earlier, 'Abū Zahrah believes that istiḥsān made on the basis of local customs is essentially the same thing as istiḥsān made on the basis of maṣlaḥah, since sound local customs, from the Mālikī point of view, are instances of maṣlaḥah.[2] Similarly, the principle of rafᶜ al-ḥaraj is closely connected with maṣlaḥah, from the Mālikī point of view; to create unnecessary difficulties for the people in the application of the law creates an aversion in them to the law and defeats its purpose.[3] Furthermore, 'ijmāᶜ would not appear to be a basis of istiḥsān, properly speaking; rather it is consensus that the basis for a given application of istiḥsān, whatever that basis was, was valid. Hence, it relates to the authority of given applications of the principle.[4]

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[1]Cited by ash-Shāṭibī, Al-Muwāfaqāt, 4:207-208; idem, Al-Iᶜtiṣām, 2:320-321. Note: the citation in Al-Iᶜtiṣām is not complete; although it speaks of four considerations, it cites only three, omitting 'ijmāᶜ, which is mentioned in the citation in Al-Muwāfaqāt. Ash-Shāṭibī cites an example of istiḥsān on the basis of 'ijmāᶜ in Al-Iᶜtiṣām, 2:324-325.

[2]See above, p. 205.

[3]See ash-Shāṭibī, Al-Muwāfaqāt, 3:60-76; 4:233-243.

[4]Cf. idem, Al-Iᶜtiṣām, 2:324-325.

There is also another basis upon which Mālik does istiḥsān, as ash-Shāṭibī points out and as is borne out by examples in the Mudawwanah.[1] Mālik also does istiḥsān on the basis of the contrary opinions of other prominent fuqahā', Madīnan and non-Madīnan. In such cases, Mālik will sometimes modify his own position out of deference for the contrary opinions of others.[2]

To the extent that istiḥsān is based on principles of Islamic law like rafᶜ al-ḥaraj, maṣlaḥah, fairness, justice, and so forth, it can be argued--as ash-Shāṭibī and others have done--that it is not arbitrary. The legal principles upon which istiḥsān is based constitute an objective criterion of sorts, such that application of istiḥsān is not purely subjective. Nevertheless, the application of principles like istiḥsān, which draw exception to and sometimes contradict well-established general precepts of law, also calls for a considerable amount of personal judgment on the part of the faqīh or qāḍī who applies it. In the myriad of circumstances that present themselves before him, he must determine at which point strict application of the general precept becomes excessive and unwarranted.

Perhaps, it is this element of personal discretion that ash-Shāfiᶜī sought to remove by his insistence upon

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[1]See below, pp. 259-261.

[2]Ash-Shāṭibī, Al-Iᶜtiṣām, 2:329-330.

strict adherence to literal texts of law or qiyās on the basis of them. Ash-Shāfiᶜī's stance, however, requires a further position that strict application of legal texts and general precepts will not lead to excess and undue harm and will not obliterate maṣāliḥ which it was the purpose of the precepts and of the law in general to secure. Such a position, as pointed out earlier, would be close to the 'Ashᶜarī theological position, for it would hold that man cannot know what is in his best interest without reference to specific revealed texts, and it would probably conclude that it is unthinkable that strict application of these texts could lead to excess and injustice, inequity and undue harm.

On the other hand, those like ash-Shāṭibī and Mālikī legal theorists in general, who hold that strict application of precepts directly or by qiyās will lead to excess and injustice, inequity and undue harm in some circumstances, hold that the principle of strict application of legal precepts without regard to specific circumstances is in violation of the ultimate purposes of Islamic law. Apparently the conclusion of their position would be that in the application of the law there can be no mechanical substitute for sound personal judgment, discretion, and integrity. Later legal theorists attempted to set down stipulations upon the application of principles of istidlāl that would safeguard the danger of their being used to annul well-established precepts altogether or violate the purposes of Islamic

law.[1] One could also devise various institutional checks and balances to minimize such arbitrariness in the administration of justice. Nevertheless, as long as one subscribes to principles of istidlāl, some degree of interpretation and personal discretion is inescapable. Thus, from a moral standpoint, the application of the law and the administration of justice is inevitably a trust and a trial. From the standpoint of Islamic law, therefore, principles of istidlāl contain both maṣāliḥ and mafāsid. On the one hand, they enable the faqīh or qāḍī of integrity a vehicle by which to apply the law to new and changing circumstances with equity and justice and in a manner consistent with the ultimate purposes of Islamic law. On the other hand, they enable those who lack such integrity a means to justify abuses, annul general precepts, and defeat the purposes of the law.

In this regard, principles of istidlāl are akin to other things in man's experience--such as modern technology--that can be put to constructive and destructive ends. Thus, from the standpoint of Mālikī legal theory, steps must be taken to insure as far as possible that the maṣāliḥ brought about by such principles are greater than the mafāsid they bring about.[2]

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[1]See below, pp. 271-273.

[2]See below, p. 263.

Ḥanafī Istiḥsān

'Abū Zahrah concludes on the basis of his comparative studies of Mālik and 'Abū Ḥanīfah that Mālik used istiḥsān more frequently than 'Abū Ḥanīfah. He holds, furthermore, that there are some significant differences between the type of istiḥsān which 'Abū Ḥanīfah uses most frequently and Mālikī istiḥsān, the consistent characteristic of which is to draw exception to qiyās and the direct application of precepts on the grounds of principles like raf^c al-ḥaraj.[1]

According to 'Abū Zahrah, the most common type of istiḥsān in the Ḥanafī school is what Ḥanafī legal theorists call "al-qiyās al-khafī" [unobvious qiyās], as opposed to al-qiyās al-jalī [obvious qiyās]. In this type of istiḥsān the faqīh finds a signifying analogy in another legal precept which he believes to be more appropriate, although at first its applicability is not as readily apparent as the signifying analogy of another precept, i.e. al-qiyās al-jalī. The istiḥsān of the faqīh is his decision to follow al-qiyās al-khafī instead of al-qiyās al-jalī.[2] Thus, this

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[1]'Abū Zahrah, Mālik, p. 453.

[2]Ibid., p. 355; see az-Zarqā, 1:83-84, 92. Az-Zarqā refers to this type of istiḥsān as "al-istiḥsān al-qiyāsī" [istiḥsān that is like qiyās]. Istiḥsān in such examples, he explains, is a matter of preferring a stronger and sounder qiyās that is more appropriate to the situation over other types of qiyās that are more far-fetched. Thus, it pertains only to those legal questions to which more than one type of qiyās are potentially applicable; ibid., 1:83-84.

type of istiḥsān is essentially a type of qiyās, for it is a matter of the faqīh determining which analogy is the most appropriate. According to 'Abū Zahrah, the prevalence of al-qiyās al-khafī in Ḥanafī istiḥsān reflects the dominant role that analogical reasoning plays in the Ḥanafī school.[1] In the Mālikī school, he holds, al-qiyās al-khafī is not regarded to be a type of istiḥsān at all but only another type of qiyās.[2]

In addition to al-qiyās al-khafī, Ḥanafī legal theory speaks of four other types of istiḥsān: 1) istiḥsān al-'ijmā^c [istiḥsān supported by 'ijmā^c], 2) istiḥsān as-sunnah [istiḥsān supported by the sunnah], 3) istiḥsān aḍ-ḍarūrah [istiḥsān made on the basis of absolute necessity],[3] and 4) istiḥsān made on the basis of local customs.[4] Istiḥsān al-'ijmā^c is a matter of setting aside the strict requirements of qiyās in matters in which 'ijmā^c has been reached on the validity of rulings contrary to qiyās.[5] This and the fourth type of istiḥsān are clearly parallel to types of Mālikī istiḥsān.

Istiḥsān as-sunnah is a type of istiḥsān whereby 'Abū Ḥanīfah sets aside the strict application of qiyās and cites

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[1]'Abū Zahrah, Mālik, p. 437. [2]Ibid., p. 355.

[3]Az-Zarqā, 1:92, 87. [4]'Abū Zahrah, Mālik, p. 355.

[5]Ibid.; az-Zarqā, 1:92.

isolated ḥadīth as references or ancillaries.[1] Az-Zarqā holds that it is incorrect to consider istiḥsān as-sunnah as a type of istiḥsān and that it should simply be regarded as part of the sunnah.[2] I doubt, however, that his opinion is valid. First of all, the term "istiḥsān as-sunnah" is misleading. A term like istiḥsān khabar al-wāḥid [istiḥsān on the basis of an isolated report] would be more appropriate, because of the distinction in Ḥanafī legal theory between the authoritativeness of well-known ḥadīth that conform to the well-known sunnah and isolated ḥadīth that are contrary to it. Secondly, as pointed out in the discussion of 'Abū Ḥanīfah's concept of qiyās, his acceptance of isolated ḥadīth that are contrary to well-established precepts is significantly different from his acceptance of well-known ḥadīth. Such isolated ḥadīth have only limited acceptance; he regards them to be anomalies, restricts them to the specific provisions of their texts, and does not permit qiyās to be done on the basis of them.[3] Finally, it would be worth knowing whether in istiḥsān as-sunnah it is the isolated ḥadīth which is the source of authority or rather the logic of istiḥsān to which the isolated ḥadīth happens to conform. For if it is the logic of istiḥsān that is authoritative,

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[1] 'Abū Zahrah, Mālik, p. 355; az-Zarqā, 1:92.

[2] Az-Zarqā, 1:93. [3] See above, pp. 239-240.

the citation of the isolated ḥadīth--which otherwise would have been rejected--is somewhat perfunctory, for it would not be the basis of the istiḥsān but, at best, only an ancillary witness to the validity of the istiḥsān.

Istiḥsān aḍ-ḍarūrah, according to az-Zarqā, is the only type of Ḥanafī istiḥsān that is clearly contrary to qiyās and cognate to Mālikī istiḥsān. (He does not consider Ḥanafī istiḥsān on the basis of local customs, and, although I disagree with his analysis of istiḥsān as-sunnah, it is distinctive in that it refers back to a legal text, even though there is some question about the authority of that text.) Istiḥsān aḍ-ḍarūrah is made on the basis of the need to fulfill a necessity [sadd li-'l-ḥājah] or to remove an undue harm [daf^{c} li-'l-ḥaraj].[1]

'Abū Zahrah holds that the Ḥanafī concept of istiḥsān aḍ-ḍarūrah is identical to Mālikī istiḥsān but is not the same as the Mālikī concept of al-maṣāliḥ al-mursalah. 'Abū Ḥanīfah, according to him, did not regard anything similar to al-maṣāliḥ al-mursalah to be an independent source of law, and rarely does 'Abū Ḥanīfah make the consideration of maṣāliḥ the sole basis of his reasoning without reference to specific texts and legal precepts. Furthermore, istiḥsān aḍ-ḍarūrah is much less common in the Ḥanafī school than its counterpart in the Mālikī school.[2] Az-Zarqā disagrees

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[1]Az-Zarqā, 1:87.

[2]'Abū Zahrah, Mālik, pp. 355, 368, 391, 436-438, 453.

with 'Abū Zahrah and holds that Ḥanafī istiḥsān aḍ-ḍarūrah is an equivalent of al-maṣāliḥ al-mursalah. Nevertheless, he adds that the Mālikīs developed the concept of al-maṣāliḥ al-mursalah more fully and, thus, came to regard it as an independent source of law, while istiḥsān aḍ-ḍarūrah remained a branch of istiḥsān.[1]

Illustrations of Mālikī Istiḥsān

Mālik states that the produce of patches of watermelons, cucumbers, melons, carrots, and similar agricultural produce may be sold completely once the first fruits [ṣalāḥ] of the crop have appeared. The buyer will have rights over the patch during the remainder of the growing season until the patch dries up. Mālik states that no specified period has been set for the time during which the buyer has rights over the patch, because the people know well the periods that apply to such matters. He discusses further what legal provisions exist for compensating the buyer if the crop is destroyed during the course of the growing season.[2] This ruling is an exception to the general precept of Mālikī fiqh and Islamic law in general that transactions of buying and selling are to be made for set quantities of goods to

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[1]Az-Zarqā, 1:89, note 1, 1:123-124.

[2]Muwaṭṭa', 2:619; cf. ibid., 2:631, where Mālik describes a certain transaction as "khafīf" [light, i.e. trivial and excusable or insignificant], apparently on the basis of istiḥsān.

be sold at set periods of time at set prices. In this case, neither the quantities or periods are known exactly; it appears to be an example of istiḥsān made on the basis of local customs.

Ibn al-Qāsim regards a certain common type of transaction among the people in accordance with which they buy and sell women's ankle bracelets [khalkhālain] to be permissible on the basis of istiḥsān and adds that 'Ashhab held the same opinion. The qiyās in this matter, he states, is that such contracts of buying and selling should be void because of an irregularity they contain. He regards them as valid, however, since they are something that the people cannot get around ["hādhā mimmā lā yajid an-nās minhu buddan"].[1] Local customs may be part of the consideration here also; it is, furthermore, an instance of the application of raf^c al-ḥaraj, since to prohibit the people from doing something which they cannot get around doing would be to cause them excessive hardship.

Mālik holds that no one coming from another land or city should enter Makkah unless he is wearing the pilgrim's garb. He does not agree with a contrary opinion of Ibn Shihāb az-Zuhrī that there is no harm in one's entering Makkah without wearing pilgrim's garb. Mālik adds, however, that there is no harm in the case of people living in areas around

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[1]Mudawwanah, 3:102 (2).

Makkah--like aṭ-Ṭā'if and Jaddah--entering Makkah without wearing the pilgrim's garb who come there frequently in order to bring fruits, other food stuffs, firewood, and so forth. Mālik's istiḥsān in this case is clearly based on the principle of rafᶜ al-ḥaraj, since, as he states, it would be burdensome upon them ["yakburu ᶜalaihim"] if they were required to don the pilgrim's garb in such cases.[1]

In this same example, Ibn al-Qāsim is asked if a Muslim from a distant land like Egypt who enters Makkah without being in the pilgrim's garb either intentionally or out of ignorance and then returns home ought to be required to make some compensation for his erroneous behavior. Although Ibn al-Qāsim disapproves strongly of such behavior, he states that he would not require the man to make any compensation because of Ibn Shihāb's contrary opinion that there is no harm in one's entering Makkah without wearing the pilgrim's garb.[2] This is an example of istiḥsān made out of deference to the contrary opinions of other fuqahā'.[3]

In the following instance, Mālik applies this type of istiḥsān. He regards certain types of irregular marriage contracts to be unconditionally invalid. Whenever such a type of marriage occurs, Mālik holds that it should be render void [mafsūkh] without going through the formality of

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[1]Mudawwanah, 1:303 (12). [2]Ibid.

[3]See above, p. 251.

making the husband divorce the wife, in which case the husband and wife would retain rights of mutual inheritance during the waiting period. There are other types of marriage contracts, however, which Mālik regards to be invalid but which other fuqahā'--Ibn al-Qāsim refers to them as the "Easterners" ["'ahl ash-sharq" and "'ahl al-mashriq"], i.e. the Kūfans--regard to be valid. Mālik modifies his position in the case of such marriages, as Ibn al-Qāsim states, out of deference to the contrary opinions of the Easterners. Hence, he rules that such marriages must be ended by requiring the husband to divorce the wife. The woman retains her right to the dowry,and both wife and husband retain rights of mutual inheritance during the waiting period.[1]

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[1]Mudawwanah, 2:185 (5), 153 (18); cf. ash-Shāṭibī, Al-Iᶜtiṣām, 2:329-330.

For additional illustrations of istiḥsān see: Mudawwanah, 1:193 (12); ibid., 1:90 (11), regarding the permissibility of seeking shelter from rain and snow in churches; ibid., 1:50 (9), that one should not pay excessive prices for water with which to perform ritual ablutions even when there is no other water available; ibid., 3:92 (19), Mālik does not prohibit a certain transaction, despite the fact that he disapproves of it, because to prohibit it would be to cause the people great hardship; see also Muwaṭṭa', 2: 709, 636, 661, which are discussed below, pp. 618-622. Ash-Shāṭibī regards the opinion of the Prophet's Companions that public baths should be permissible although they are contrary to some points of Islamic precepts of buying and selling to be an example of istiḥsān, Al-Iᶜtiṣām, 2:318; similarly, the fuqahā' hold that rooming and boarding are permissible, although the boarder pays in advance for his meals and the number of meals he will eat and the quantity of the meals are not specified, see ibid., 2:328-329. Ibn Rushd discusses several provisions of Mālikī fiqh regarding the liability of the buyer that are derived on the basis of istiḥsān; see Ibn Rushd, 2:112 (15), 108 (17). According to Ibn Rushd, Mālik's opinion that women may read the Qur'ān during the

Sadd adh-Dharā'i^c

Sadd adh-dharā'i^c [lit., the obstruction of means (to illegitimate ends)] is a distinctive feature of the Mālikī and Ḥanbalī schools.[1] It is a principle of legal reasoning whereby ostensibly permissible acts are prohibited [i.e. obstructed] whenever they become means [dharā'i^c] to impermissible ends.[2] It is used primarily for invalidating legal fictions [ḥiyal], and Ibn Taimīyah praises Mālik highly for the consistency with which he applies sadd adh-dharā-i^c to that end.[3]

According to ash-Shāṭibī, the principle of sadd adh-dharā'i^c is consistent with the view that one of the ultimate purposes of Islamic law is to secure maṣāliḥ, which can only be done by guarding against the encroachment of mafāsid, which it is the purpose of sadd adh-dharā'i^c to do. He holds, furthermore, that it is a principle of Islam-

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days of their menses is istiḥsān, ibid., 1:29 (27). Similarly, Mālik does not extend full rights of guardianship to a woman's relative other than her father, on the grounds that other relatives are not as likely to have the woman's interest at heart, ibid., 2:5 (8).

[1]'Abū Zahrah, Mālik, p. 405; idem, Ibn Ḥanbal, pp. 314-328; al-Fāsī, p. 156; Ibn Rushd [al-Jadd], 2:198; az-Zarqā, 1:106-108; at-Turkī, pp. 461, 474. The Ḥanbalī legal theorist Ibn Qayyim regards sadd adh-dharā'i^c as constituting a fourth of the obligations [taklīf] of Islamic law; he treats the principle thoroughly and cites ninety-nine illustrations of it; cited by al-Fāsī, p. 156 and 'Abū Zahrah, Mālik, p. 409. 'Abū Zahrah gives a good treatment of Ibn Qayyim's presentation.

[2]See above references.

[3]Ibn Taimīyah, Ṣiḥḥat 'Uṣūl, pp. 51-53.

ic law that the obstruction of mafāsid takes priority over the acquisition of maṣāliḥ, whenever the two come into conflict. Hence the maxim of Islamic law:

> Whenever a mafsadah gains the upperhand over ['arbat ᶜalā] a maṣlaḥah, the legal judgment will be handed down with a view to the mafsadah. Mafāsid are prohibited; hence, prohibition [al-manᶜ] becomes required clearly of both [the mafsadah and the maṣlaḥah in the given matter].[1]

According to az-Zarqā and 'Abū Zahrah, it is not the purpose of the faqīh or qāḍī in applying sadd adh-dharā'iᶜ to establish the intent of the person in question to attain illegitimate ends by his ostensibly permissible act. Rather, one looks only to the act itself and the potential results it could lead to.[2] Nevertheless, expressions used in the Muwaṭṭa' and Mudawwanah indicate that one who applies sadd adh-dharā'iᶜ suspects the one against whom he applies it of having intended to attain illicit ends. Ibn Rushd refers to this presumption, which underlies sadd adh-dharā'iᶜ, as "'iᶜmāl at-tuhmah" [application of suspicion].[3] Az-Zuhrī is reported to have said, for example, that in the early period there was no suspicion [tuhmah] involved when a father gave witness on behalf of his son; later, however, when the morals of the people began to deteriorate the witness

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 4:272; 1:174.

[2]Az-Zarqā, 1:106, 108; 'Abū Zahrah, Mālik, pp. 406-407.

[3]Ibn Rushd, 2:50 (8); 17-18 (29); 45 (15); 85 (4); 84 (18); 85-86 (25).

of a father for his son and similar types of witness were prohibited because of the suspicion [ittihām] that they were not trustworthy.[1] I referred earlier to the example of sadd adh-dharā'i^c in which Mālik regards the motive of a man to be suspicious [yuttaham] who marries a woman while she is critically sick.[2] There are other examples in the Muwaṭṭa' and Mudawwanah of his speaking about tuhmah and ittihām in connection with the application of sadd adh-dharā'i^c.[3]

According to ash-Shāṭibī, 'Abū Ḥanīfah and ash-Shāfi^cī reject sadd adh-dharā'i^c because of their rejection of this presumption of motive that it involves. They hold that there must be clear indication of the intent of the person in question to use outwardly permissible actions as a means to impermissible ends before it is legitimate to prohibit those actions.[4] In so far as 'Abū Ḥanīfah's rejection of sadd adh-dharā'i^c is concerned, it would be interesting to explore whether or not there is any connection between it and his murji'ī theological position. For, ac-

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[1]Mudawwanah, 4:80. [2]See above, pp. 130-131.

[3]See Muwaṭṭa', 2:868 and Mudawwanah, 4:105 (24), 110 (4).

[4]Ash-Shāṭibī, Al-Muwāfaqāt, 4:200-201. This is also 'Abū Zahrah's assessment of the position of 'Abū Ḥanīfah and ash-Shāfi^cī; see idem, Mālik, p. 412. See also above, pp. 220-221; ash-Shāfi^cī, "'Ibṭāl al-Istiḥsān," pp. 269 (15), 270 (10); idem, "Ar-Radd," p. 300 (20), where he cites ash-Shaibānī's arguments against sadd adh-dharā'i^c.

cording to J. Meric Pessagno, 'Abū Ḥanīfah's murji'ī theological position is essentially a voluntaristic and not a rationalistic philosophy. It holds that human acts can only be evaluated when the motive behind them has been discovered, for "the direction of the will determines the nature of the human act."[1] Thus, it may have been for this reason that, in the absence of knowledge of the motive, the Ḥanafīs refused to question the legitimacy of ostensibly legitimate acts, even though those acts could be used as means to illegitimate ends.

Illustrations of Mālik's Application of Sadd adh-Dharā'i^{c}

It is part of Madīnan ijtimā^{c} that one may hire out one's male slaves and animals. The same Madīnan ijtimā^{c}, however, prohibits such transactions in the case of slave women. The reason for this, Mālik explains, is because slave women might be exploited for the sexual gratification of those to whom they are hired out. The people of learning in Madīnah, he continues, have always forbidden such transactions to all people on the grounds that to permit them would provide a means ["dharī^{c}ah"] for making permissible [ḥalāl] that which is forbidden [ḥarām].[2] Here Mālik has set forth explicitly the concept of sadd adh-dha-

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[1]J. Meric Pessagno, "The Murji'a, Īmān, and 'Abū ^{c}Ubaid," JAOS, 95 (1975):390.

[2]Muwaṭṭa', 2:682; Mudawwanah, 3:130 (6).

rā'i^{c} as an explanation for a traditional Madīnan legal opinion. It is also noteworthy that he has used the word "dharī-^{c}ah". Furthermore, since the ruling is a traditional legal opinion and the reasoning Mālik sets forth to account for it is said to be traditional Madīnan reasoning, it would appear that the concept of sadd adh-dharā'i^{c} was a traditional part of the legal reasoning of Madīnah.

Mālik states that it is Madīnan ijtimā^{c} that a murderer will not be permitted to inherit any part of the diyah [indemnity] of a relative whom he has murdered or any part of that relative's estate. Furthermore, the murderer cannot stand in the way of other relatives inheriting in his place who are more distant than he from the victim in kinship. There has been a difference of opinion, Mālik points out, however, among the fuqahā' of Madīnah as to whether or not a man who kills a relative by accident should be permitted to inherit his share of the victim's estate. Some have held that he should be prohibited from inheriting any part of the victim's estate because of the tuhmah [that he may have designed the relative's murder for that purpose and made it appear accidental]. Mālik states that his position is that one who kills a relative accidentally should be permitted to inherit his share of the relative's estate.[1] Here again Mālik's articulation of the concept of sadd adh-dharā-

[1]Muwaṭṭa', 2:868.

'i^{c} is clear. As in the preceding example, this illustration indicates that sadd adh-dharā'i^{c} was a traditional part of Madīnan legal reasoning; in fact, in this case, those with whom Mālik disagrees were more rigorous in their application of the concept than he.

It is part of Madīnan ijtimā^{c} that a father may repossess a gift [nuḥl or ^{c}aṭā'] that he gives his son or daughter, as long as he has not given it to them by way of charity [ṣadaqah]. If, however, the child to whom the gift was given has entered into a social or economic transaction of consequence by virtue of possession of the gift, the father is no longer permitted to repossess it. Mālik clarifies the precept by citing the example of a child's having been loaned a considerable amount of money by creditors on the grounds that the child's gift could be claimed in lieu of failure to repay the loan. He cites another example of a child's having entered into a very favorable marriage contract, one of the attractions to the other party having been the child's possession of the gift. He cites the example also of a daughter's dowry having been increased by virtue of her possessing such a gift. In cases similar to these, Mālik states, it is impermissible for the father to take back what he has given.[1]

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[1]Muwaṭṭa', 2:755. For additional illustrations of sadd adh-dharā'i^{c}: Mālik's rejection of certain claims of merchants that they cannot repay debts because the money has been invested abroad, Mudawwanah, 4:105 (24); his rejec-

Al-Maṣāliḥ al-Mursalah

Al-Maṣāliḥ al-mursalah [absolute maṣāliḥ that are not "tied down" to specific texts] is a principle of legal reasoning whereby new rulings are made which are without precedent or earlier rulings are suspended, out of consideration of the best interests and welfare of society.[1] As mentioned

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tion of the claim of a dying man that one of his heirs has repaid a debt which that heir owed him, ibid., 4:110 (4); Ibn al-Qāsim's stern policy against merchants who use counterfeit coins and coins of false weight, which he justifies as a means of preserving the Muslim markets from corruption ['ifsād], ibid., 3:115 (28); cf. Muwaṭṭa', 2:635-636. According to Ibn Rushd [al-Jadd], the chapters in the Mudawwanah pertaining to contracts of buying and selling ["Al-Buyūᶜ"] are predicated upon sadd adh-dharā'iᶜ, Ibn Rushd [al-Jadd], 2:198. Ibn Rushd [al-Ḥafīd] reiterates this view and gives numerous illustrations, Ibn Rushd, 2:85-96. See also Mālik's prohibition of nikāḥ al-muḥallil--in contrast to 'Abū Ḥanīfah and ash-Shāfiᶜī--which is a type of marriage whereby a person [the muḥallil] marries a woman with the intent of divorcing her after consummation, so that she may remarry a former husband who has divorced her three times, ibid., 2:36 (2). See Mālik's position regarding the impermissibility of guardians in marriage making stipulations in the marriage contracts of the women who are entrusted to their supervision from which the guardians receive remuneration or other personal benefits from the groom, ibid., 2:17-18.

[1]For definitions see, 'Abū Zahrah, Mālik, p. 390; az-Zarqā, 1:97-98; al-Fāsī, pp. 138-144; ad-Dawālībī, p. 99.

Ad-Dawālībī explains that the adjective "mursal" used in this term means "muṭlaq" [absolute, not tied down]. Such maṣāliḥ, he continues, are regarded as being consistent with the general dictates and ultimate purposes of the sharīᶜah, although they have not been specified, i.e. "tied down" [muqayyad] in legal texts; ibid.

Some legal theorists use the term "istiṣlāḥ" [making or seeking to make rulings on the basis of maṣlaḥah] for this concept. According to az-Zarqā, it was al-Ghazālī who coined this term in his work on legal theory, Al-Mustaṣfā. Az-Zarqā prefers al-Ghazālī's term, because it articulates the concept of "making rulings" on the basis of maṣlaḥah, which is missing in the other; az-Zarqā, 1:97, note 2.

Nevertheless, it should be noted that al-Ghazālī's

earlier, both the Mālikī and Ḥanbalī schools subscribe to al-maṣāliḥ al-mursalah; the Ḥanbalī concept, however, is not as authoritative.[1] According to the view that the consideration of maṣāliḥ is the central theme of Mālikī legal theory, the concept of al-maṣāliḥ al-mursalah represents, as it were, the high point of Mālikī theory. It regards all courses of action in which there are maṣāliḥ to be potentially valid parts of Islamic law, regardless of whether or not they are witnessed in specific legal texts, as long as the mafāsid of those courses of action do not outweigh the maṣāliḥ that they bring.[2]

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term is one that, unlike "al-maṣāliḥ al-mursalah", suits his own theoretical position. For it omits the notion of "'irsāl" [i.e., of maṣāliḥ that are not tied down to specific legal texts], which is the fundamental part of the Mālikī conception. Perhaps a better term would be al-istiṣlāḥ al-mursal.

[1]See 'Abū Zahrah, Mālik, pp. 368-369, 398; idem, Ibn Ḥanbal, pp. 297-312; az-Zarqā, 1:126-129, 136-137; at-Turkī, pp. 414-416, 419, 430-435. The chief difference between the Mālikī and Ḥanbalī positions on al-maṣāliḥ al-mursalah pertains to the question of whether or not the mere consideration of maṣāliḥ can take priority over--i.e. render specific or temporarily suspend--contrary legal texts. From the Ḥanbalī point of view, legal texts always take priority, whereas they do not always from the Mālikī point of view. Ḥanbalīs follow al-maṣāliḥ al-mursalah, however, in the absence of pertinent texts, i.e., in completely unprecedented matters (see az-Zarqā, 1:136).

The Ḥanbalī Sulaimān aṭ-Ṭūfī (d. 716/1316) regards al-maṣāliḥ al-mursalah to be most authoritative; however, his position is generally considered extreme among Ḥanbalīs and non-Ḥanbalīs alike. (Az-Zarqā and 'Abū Zahrah claim that aṭ-Ṭūfī was a shīᶜī; at-Turkī [p. 424] cites information according to which aṭ-Ṭūfī refers to himself indirectly as a Ḥanbalī.) See 'Abū Zahrah, Ibn Ḥanbal, pp. 312-313; az-Zarqā, 1:129; at-Turkī, pp. 415, 424, 436, note 1; Mahmassani, p. 89.

[2]'Abū Zahrah, Mālik, p. 369; for further stipulations on al-maṣāliḥ al-mursalah, see below, pp. 271-273.

The question of to what extent a concept like that of al-maṣāliḥ al-mursalah exists in the Ḥanafī school depends, as pointed out earlier, on analysis of the Ḥanafī concept of istiḥsān aḍ-ḍarūrah, which may be cognate to al-maṣāliḥ al-mursalah.[1] According to 'Abū Zahrah, ash-Shāfi^{c}ī holds that maṣāliḥ are a priority in Islamic law; he differs fundamentally with the Mālikī concept of al-maṣāliḥ al-mursalah, however, by virtue of the premise that all maṣāliḥ are set forth in the textual sources of Islamic law. Thus, ash-Shāfi^{c}ī discerns no maṣāliḥ that are mursal, that is, which are not testified to in explicit texts or are contrary to explicit texts.[2] It is worth pointing out again that such a position, as ad-Dawālībī has pointed out, is strikingly parallel to the later 'Ash^{c}arī theological doctrine, which became widely accepted among Shāfi^{c}īs, that good and evil are not to be perceived by reason and can only be discerned by means of revealed law.[3]

Mālikī legal theorists hold that the concept of al-maṣāliḥ al-mursalah--and this would apply to the concepts of sadd adh-dharā'i^{c} and istiḥsān as well--is based on the consideration that the ultimate purpose of Islamic law is to secure what is in man's best interest in this and the next life. Ash-Shāṭibī and al-Qarāfī, for example, oppose

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[1]See above, pp. 257-258. [2]'Abū Zahrah, Mālik, p. 368.

[3]Ad-Dawālībī, p. 174; see above, pp. 222-223.

Fakhr-ad-Dīn ar-Rāzī and other scholastic theologians who have concluded, on the basis of their theological positions, that the purpose of attaining maṣāliḥ cannot be attributed to God. They argue that they have determined instead that the attainment of maṣāliḥ is an ultimate purpose of Islamic law on the basis of inductive study [istiqrā'] of Islamic law.[1] Ash-Shāṭibī observes that the signifying analogies and the points of wisdom [ḥikam] that lie behind rulings of Islamic law pertaining to social and economic transactions [al-muᶜāmalāt] are often set forth with clarity in the textual sources of the law, which he takes to be an indication that the faqīh is expected to concern himself with following the purposes of those rulings when applying them and not to concern himself only with adhering to the form of the ruling.[2]

One of the dangers of concepts like al-maṣāliḥ al-mursalah, however, as Ibn Rushd points out, is that they can be manipulated to defeat the purposes of the law and to introduce detrimental innovations.[3] To minimize this danger, Mālikī legal theorists set down stipulations upon the application of them. One of these stipulations, which ash-Shāṭibī believes Mālik followed strictly, is that of

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[1]See ash-Shāṭibī, Al-Muwāfaqāt, 2:6, 1:148; al-Qarāfī, 1:142-143, 72-73. See also ash-Shāṭibī, Al-Iᶜtiṣām, 2:295-297; Ibn Rushd, 2:5 (17), 38 (29).

[2]Ash-Shāṭibī, Al-Muwāfaqāt, cited by 'Abū Zahrah, Mālik, pp. 374-375.

[3]Ibn Rushd, 2:28 (17).

applying them in the area of social and economic transactions [al-muᶜāmalāt] and not in the area of worship [al-ᶜibādāt].[1] Thus, ash-Shāṭibī states, Mālik was so strict in not permitting modifications to be made in acts of worship out of consideration for maṣāliḥ that some of his critics who have evaluated him from this standpoint alone have reached the conclusion that Mālik was no mujtahid at all but, rather, a strict adherent to Madīnan tradition. But, on the other hand, ash-Shāṭibī continues, Mālik gives such extensive consideration to maṣāliḥ in other types of acts and transactions that some of his critics have accused him of having gone too far and having taken the liberty to set down new legislation ["fataḥa bāb at-tashrīᶜ"].[2]

There are also extensive discussions in Mālikī legal theory about the degree of immediate need that is required before principles like al-maṣāliḥ al-mursalah can be resorted to. Whereas instances of analogical reasoning are evaluated in terms of their signifying analogies [ᶜilal], the application of concepts of istidlāl is evaluated in terms of the nature of the "munāsib's" [appropriate reasons] that underlie them.[3]

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[1]Ash-Shāṭibī, Al-Iᶜtiṣām, 2:314, 283-287, 307-312.

[2]Ibid., 2:311-312.

[3]Ibid., 2:282-287, 307-313; al-Qarāfī, 1:120-122, 142-143; see also ash-Shaṭibī, Al-Muwāfaqāt, 4:27-32.

Rulings established or suspended on the basis of al-maṣāliḥ al-mursalah, sadd adh-dharā'i^{c}, or istiḥsān, furthermore, are not regarded as having intrinsic permanence, like well-established precepts of Islamic law. Al-Qarāfī's explanation for this is that precepts and rulings of law are divided into two categories: 1) those that are ends in themselves [maqāṣid] and 2) those that are means to ends [wasā'il]. Rulings made on the basis of al-maṣāliḥ al-mursalah, for example, are only means to ends. Thus, he reasons, they are legally valid only as long as they continue to secure the ends for which they were established.[1]

Illustrations of al-Maṣāliḥ al-Mursalah

Some of the clearest illustrations of al-maṣāliḥ al-mursalah are decisions of the early caliphs. 'Abū Bakr's decision to compile the Qur'ān, for example, is a good illustration. It had not been done during the Prophet's lifetime, and when ^{c}Umar ibn al-Khaṭṭāb first brought the suggestion to 'Abū Bakr, it is reported that he replied: "How can I do something which the Messenger of God did not do?" He later decided, however, that compilation of the Qur'ān was necessary and, therefore, ordered that it be done.[2] Similarly, the second caliph, ^{c}Umar ibn al-Khaṭṭāb, established public registries [dawāwīn] according to Persian mod-

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[1]Al-Qarāfī, 1:145-146; cf. Ibn Rushd, 1:162 (18).

[2]Ash-Shāṭibī, Al-I^{c}tiṣām, 2:287-288.

els, which had not been done earlier, and he instituted imprisonment as a type of punishment for certain crimes for which the Prophet had not set down punishments.[1] Although it had been the policy of the Prophet to distribute among the soldiers the fruits of their conquests, ᶜUmar ibn al-Khaṭṭāb suspended this policy in the cases of the conquests of Iraq and Egypt. His decision not to distribute these lands as private property among the conquering soldiers is regarded to be an illustration of al-maṣāliḥ al-mursalah.[2]

Although the Qur'ān states that zakāh may be given to those whose hearts are to be won over to Islam [al-mu'allafah qulūbuhum],[3] Mālik holds that this is only to be done when the Islamic state is weak and in need of such allies and that it is to be suspended under other circumstances.[4] Mālik makes exceptional stipulations on travelling merchants to insure that they will not escape the payment of zakāh altogether.[5]

Ash-Shāṭibī holds, on the basis of al-maṣāliḥ al-mursalah that it is legitimate for a just Muslim ruler to levy taxes upon the wealthy and upon agricultural produce, when the proceeds from zakāh prove to be insufficient to support the army or meet other essential needs of the state.[6] Mā-

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[1]See at-Turkī, p. 416. [2]Ibn Rushd, 1:236 (19).

[3]Qur'ān, 9:60. [4]Ibn Rushd, 1:162 (18). [5]Ibid., 1:159 (10).

[6]Ash-Shāṭibī, Al-Iᶜtiṣām, 2:295-298.

likī fuqahā' have regarded it legitimate on the basis of al-maṣāliḥ al-mursalah; furthermore, to convict thieves and criminals on the basis of substantial circumstantial evidence or other evidence that is not conclusive in situations in which it is extremely difficult to produce conclusive evidence.[1] Similarly, Mālik states in the Muwaṭṭa' that it is part of Madīnan ijtimā^c to accept the testimony of boys, whose testimony would not otherwise be acceptable, when they inflict wounds upon each other in fighting, which is an exception to the general precepts regarding testimony. Mālik makes the stipulation, however, that their testimonies must be taken immediately, that is, before they have a chance to break up and to speak with adults.[2] (The ruling pertains to cases in which no adults are present.)

The Distinction between al-Maṣāliḥ al-Mursalah and Sadd adh-Dharā'i^c and Istiḥsān

Istiḥsān and sadd adh-dharā'i^c are fairly easy to distinguish between because they have opposite effects. The fundamental characteristic of Mālikī istiḥsān is to make exception to well-established, general precepts. Hence, application of istiḥsān tends to make permissible, actions or transactions that would be impermissible, were the general precept to be applied rigorously. Sadd adh-dharā'i^c, on the other hand, makes prohibited, actions and transactions that

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[1]Ash-Shāṭibī, Al-I^ctiṣām, 2:293-295.

[2]Muwaṭṭa', 2:726.

otherwise would be permissible.

In this regard, istiḥsān and sadd adh-dharā'i^{c} are easy to distinguish from those types of al-maṣāliḥ al-mursalah, such as 'Abū Bakr's decision to compile the Qur'ān or ^{c}Umar ibn al-Khaṭṭāb's decision to establish the public registries, that have no precedent and, hence, do not contradict other well-established precepts, although they do alter the existing state of affairs. But the distinction between istiḥsān and sadd adh-dharā'i^{c}, on the one hand, and al-maṣāliḥ al-mursalah, on the other, is not as clear in those examples of al-maṣāliḥ al-mursalah that suspend earlier precepts. In this regard, al-maṣāliḥ al-mursalah may be like istiḥsān in that it permits things that otherwise would not be permissible, such as the example above of accepting circumstantial evidence. Or it may be like sadd adh-dharā'i^{c} in that it prohibits earlier precepts or policies, such as ^{c}Umar ibn al-Khaṭṭāb's decision to prohibit the soldiers of the armies that conquered Egypt and Iraq from dividing the conquered lands among themselves as private property, although the Prophet's policy had been one of giving the soldiers the fruits of their conquests.

In such cases, there does not appear to be an essential difference between istiḥsān or sadd adh-dharā'i^{c} and al-maṣāliḥ al-mursalah. It would appear, however, that the contention of later Mālikī legal theorists was that al-maṣāliḥ al-mursalah differed from the other concepts in such

cases in that al-maṣāliḥ al-mursalah pertains to matters that are essential needs of society as a whole and not just individual members of society,[1] one of the principles of al-maṣāliḥ al-mursalah being in this regard, according to ash-Shāṭibī, that the general interests of society [al-maṣlaḥah al-ᶜāmmah] always take priority over the limited interests of individuals [al-maṣlaḥah al-khāṣṣah].[2]

Furthermore, in some instances of the application of al-maṣāliḥ al-mursalah, especially those instances that suspend well-established precepts of law, there is a sense of emergency that does not characterize the application of istiḥsān and sadd adh-dharā'iᶜ. The application of al-maṣāliḥ al-mursalah in such cases constitutes an emergency measure which one would not expect to be taken under other circumstances. In such cases, furthermore, there is a real contradiction between the policy that is followed and the precept that is suspended which would not be expected to occur ordinarily. Al-Qarāfī illustrates this type of al-maṣāliḥ al-mursalah by the example of requiring a Muslim army to fire upon the enemy even though the enemy have shielded themselves with Muslim captives. The situation is such that, if the Muslim army does not fire on the enemy, it will probably be defeated, and defeat will expose

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[1]Cf. al-Qarāfī, 1:142-143; ash-Shāṭibī, Al-Iᶜtiṣām, 2:314. For discussion of the absolute needs of society [aḍ-ḍarūrīyāt] and lesser needs, see idem, Al-Muwāfaqāt, 4:27-32.

[2]Ash-Shāṭibī, Al-Iᶜtiṣām, 2:292-293.

the Muslim population it is protecting to death or captivity.[1]

In this case, there is a true contradiction, I believe, between the policy that is followed and the precept that is suspended, namely, the precept that it is prohibited for Muslims to kill innocent Muslims. Furthermore, it is a contradiction that should not occur under usual circumstances. The policy that is followed here is based on the principle that Muslim society must be defended. Ordinarily, however, Muslim society can be defended without Muslims being forced to take the lives of other Muslims. Because of the unusual circumstances, however, that principle and the precept that it is prohibited for Muslims to kill innocent Muslims have come into conflict such that only one of them can be had and only at the expense of the other. Hence, it becomes necessary to establish priorities and to suspend that precept or principle which has the lesser priority. In this case, the principle has the higher priority, for, as ash-Shāṭibī has stated above, "the general interests of society always take priority over the limited interests of individuals." Nevertheless, the decision to fire upon the enemy and his Muslim captives does not become desirable; on the contrary, it is simply necessary.

Such true contradiction does not occur in the appli-

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[1]Al-Qarāfī, 1:142-143.

cation of istiḥsān and sadd adh-dharā'i^{c} nor, for that matter, in all examples of al-maṣāliḥ al-mursalah. For the faqīh by resorting to istiḥsān or sadd adh-dharā'i^{c} does not contradict the general precepts to which he makes special exceptions or the general permissions which he prohibits in special cases. He indicates, rather, that it was not the intent of that general precept or general permission to be extended to such circumstances. Thus, it becomes not only necessary but also desirable that he make the specific exception or prohibition. To give a more up-to-date example, there is no true contradiction between the general precept that motor vehicles must stop for red lights and the special provision [istiḥsān] that emergency vehicles are exempted. For it was not the purpose of the general precept to be applied in such circumstances. Similarly, there is no contradiction between Mālik's general precept that a father may take back gifts he gives his children and the special prohibition that he may not do it if the child has entered into a social or economic matter of consequence by virtue of possessing the gift. For it was not the purpose of the general precept that it be used to defraud creditors and so forth. Furthermore, matters such as these to which istiḥsān and sadd adh-dharā'i^{c} apply, as can be seen from the examples, do not have the same characteristic of emergency and unusualness. They may not be common; nevertheless, they can be expected to occur in normal societies under usual conditions.

PART TWO

MĀLIK'S CONCEPTION OF MADĪNAN ᶜAMAL

CHAPTER IV

A SURVEY OF PERTINENT WRITINGS AND LITERATURE ON ᶜAMAL

Modern Literature in Western Languages

Consideration of the ᶜamal of the early Muslim community makes up an important part of the theses of those modern scholars who have written in Western languages on the origins of Islamic law and legal theory. Their hypotheses about the earliest conceptions of sunnah, the nature of ḥadīth and the history of its transmission and compilation, and the role of ash-Shāfiᶜī in the development of Islamic legal theory are tied fundamentally to conclusions they have reached pertaining to the early established practice [ᶜamal] of the Muslim community. With only one exception that I know of,[1] they discuss "established practice", however, as a general phenomenon taking place in all regions of the early Islamic empire, and, although they often discuss Madīnan ᶜamal as an important part of this phenomenon, they do not single it out for detailed, empirical analysis.

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[1]Muhammad Yusuf Guraya, "The Concept of Sunnah in the Muwaṭṭa' of Mālik ibn Anas" (M.A. thesis, McGill University, 1969).

The concern of these writings is generally two-fold in that they are concerned 1) with questions of social, economic, political, and cultural history that pertain to what, in fact, this ᶜamal actually was and 2) with the question of intellectual history that pertains to what the early fuqahā' conceived this ᶜamal to be. My primary concern, as I have clarified in the Introduction, is with the question of intellectual history of how Mālik conceived of Madīnan ᶜamal, the broader and very important historical questions of what ᶜamal actually was, being beyond the scope of my dissertation. Nevertheless, some of the conclusions I have reached, in addition to their direct bearing on those hypotheses of modern writers pertaining to the intellectual history of the conceptualization of ᶜamal, are also useful to the historical analysis of what ᶜamal actually was.

Finally, these studies have not approached the question of what ᶜamal was or how it was conceived to be, from the standpoint of Mālikī legal theory. On the contrary, I believe it is fair to say that the almost uniform perspective of modern writers writing in Western languages on this topic has been essentially that of Shāfiᶜī legal theory, which may reflect in some cases the extensive exposure of these writers to ash-Shāfiᶜī's writings on legal theory and his polemical tracts.

Thus, for example, Guraya states at one point that Mālik's conception of sunnah differs from the "orthodox"

conception because, according to the "orthodox" view, the sunnah is constituted only on the basis of Prophetic ḥadīth.[1] As pointed out earlier, however, such an "orthodox" view is, more accurately, the Shāfiᶜī point of view, to which legal theorists of neither the Mālikī, Ḥanafī, or Ḥanbalī schools ever fully agreed.[2] Similarly, it is from an essentially Shāfiᶜī perspective, I believe, that Ansari states that the Kūfan fuqahā' of 'Abū Yūsuf's time were more "advanced" than the Syrians or Madīnans because the Kūfans were relying more heavily on ḥadīth and were referring much less frequently to their local practices.[3] Likewise Schacht speaks of a "classical theory" of Islamic law consisting of the four sources of the Qur'ān, the Prophetic sunnah as constituted by ḥadīth, 'ijmāᶜ, and qiyās, the creation of which he regards to be essentially "Shāfiᶜī's achievement".[4] Perhaps most important of all, however, the early phenomenon of ra'y [personal opinion], which is of such central importance to

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[1]Guraya, p. 5. Similarly, Ahmad Hasan (p. 49) speaks of Prophetic ḥadīth as the"index and vehicle" of the sunnah.

[2]See above, pp. 121-128.

[3]Zafar Ishaq Ansari, "The Early Development of Islamic Fiqh in Kūfah with Special Reference to the Works of 'Abū Yūsuf and Shaybānī" (Ph.D. dissertation, McGill University, 1966), pp. 243, 21.

[4]See Joseph Schacht, The Origins of Muhammadan Jurisprudence (Oxford: Clarendon Press, 1959), pp. 1-2; cf. above, pp. 121-128.

the history of Islamic law and legal theory, has been studied in contrast primarily to ash-Shāfi^{c}ī's later definition of qiyās--to which only he of the four major sunnī schools of law limited ijtihād[1]--with occasional references to the Ḥanafī notion of istiḥsān.[2] Little attention, if any, is given to the different manners in which the legal theories of the four sunnī schools conceived of qiyās and istiḥsān, and I have not found mention in any of these modern works of sadd adh-dharā'i^{c} and al-maṣāliḥ al-mursalah, which are important considerations in Mālikī and Ḥanbalī legal theory.[3]

It is worthy of note that Robert Brunschvig has pointed out the possibly distorting effect of this largely Shāfi^{c}ī perspective in the study of the origins of Islamic law. In an article of his, he studies some of the major polemical writings against the Mālikī school. Toward the end of the article, he presents the response of al-Qāḍī ^{c}Iyāḍ to such polemics. Noting the usefulness of ^{c}Iyāḍ's insights as well as those of the anti-Mālikī polemicists, Brunschvig remarks that there would be considerable value in the arguments of medieval Muslim scholars for modern scholars studying the origins of Islamic law. He concludes by observing that we

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[1]See above, pp. 226, 220-222.

[2]See, for example, Goldziher, Ẓāhiriten, pp. 11, 21; Schacht, pp. 98-133; Ahmad Hasan, pp. 53, 145-151; Fazlur Rahman, Islamic Methodology in History, Publications of the Central Institute of Islamic Research (Pakistan), no. 2 (Karachi: Central Institute of Islamic Research, 1965), pp. 1-26.

[3]See above, pp. 209-279.

may well see the origins of Islamic law in a new light, "if we can free ourselves from the hold of ash-Shāfi^{c}ī, whose ingenious synthesis has falsified our perspectives for a long time indeed."[1]

Theories on the Original Concept of Sunnah and the Practice of the Early Community

Those who hold that there was no Prophetic sunnah

Margoliouth, Lammens, and Schacht hold that there was no original concept of Prophetic sunnah and that the extra-Qur'ānic legacy of the Prophet, if any, was very small.[2] Coulson modifies Schacht's systematic denial of the content of a Prophetic sunnah; nevertheless, he regards the vast majority of what has been attributed to the Prophet to be spurious and follows the outlines of Schacht's thesis so closely that I have found it appropriate to treat Coulson in conjunction with Schacht.[3]

They hold that what later came to be regarded as the

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[1]Robert Brunschvig, "Polémiques médiévales autour du rite de Mālik," Andalus 15(1950):413.

[2]David Samuel Margoliouth, The Early Development of Mohammedanism: Lectures Delivered in the University of London (New York: C. Scribner's Sons, 1914), pp. 65-98; Henri Lammens, Islam: Beliefs and Institutions, trans. Sir E. Denison Ross (London: Methuen & Co., 1929), pp. 68-69; Schacht, Origins, pp. 4-5, 20, 30, 40, 58, 61-63, 76, 80; idem, An Introduction to Islamic Law (Oxford: Clarendon Press, 1964), pp. 29-35. See also the analyses of these works in Fazlur Rahman, Islam, pp. 45-47, 54-55, and Ahmad Hasan, pp. 90-91.

[3]Noel J. Coulson, A History of Islamic Law, Islamic Surveys, no. 2 (Edinburgh: Edinburgh University Press, 1964), pp. 64-65, 30-43; idem, Conflicts and Tensions in Islamic Jurisprudence (Chicago: University of Chicago Press, 1969), pp. 21-22, 60.

Prophetic sunnah was originally the practice of the Muslim community, with some modifications, which had emerged during the first caliphate and the 'Umayyad period. The content of this practice had come from pre-Islamic Arab customs, personal opinions of Companions, the ad hoc reasoning and policies of 'Umayyad judges and other prominent executive authorities, as well as various Persian, Roman, and Jewish sources. Islamic practices emerged somewhat randomly in each locality; hence, there was considerable variation between local practices, and there was no uniform Islamic ᶜamal.[1]

According to this view, the development of the "ancient", i.e., pre-Shāfiᶜī schools of law was a late 'Umayyad and early ᶜAbbāsid phenomenon, which came about as a result of the dissatisfaction of fuqahā' who felt that the 'Umayyads and their judges had violated the spirit of the Qur'ān in their policies and practices. These dissatisfied fuqahā' began to elaborate a standard of conduct which they felt to be consistent with the Qur'ānic ethic. The practices and institutions that had developed during the 'Umayyad period were "reviewed", to use Coulson's expression, on an individual basis and then rejected or approved in terms of how closely they conformed to the emerging Qur'ānic ethic. As the scholars of a particular locality came gradually to agree upon a body of opinions and practices, that body became the local consensus of the emerging school. This lo-

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[1]See Coulson, History, pp. 30-36; Schacht, Introduction, pp. 29-35. Cf. Fazlur Rahman, Islam, pp. 45-47; idem, Methodology, p. 5; Ahmad Hasan, pp. 90-91; Guraya, p. 37.

cal consensus became over the years the local established practice, and from it emerged later the sunnah to which the local school subscribed. In order to undercut the authority of those 'Umayyad practices which they had rejected, these fuqahā' began to project their doctrines back to earlier authorities--Companions and prominent Successors--until, later, they ascribed them even to the Prophet himself.[1]

The concept of the sunnah of the Prophet, according to Schacht, emerged first in Kūfah in connection with this back-projection of doctrine and was a means of securing greater authority for their local practices; the Madīnans, he believes, used this concept only rarely.[2] An opposition movement grew up, however, that championed ḥadīth which it had forged and which it claimed constituted the authentic Prophetic sunnah. These proponents of ḥadīth, for whom ash-Shāfiᶜī later became the chief spokesman, were opposed to the local schools and their living traditions. By championing ḥadīth which reflected what they felt to be the true Islamic practice, they sought to undercut the authority of the early schools in the same manner that the early schools had undercut those 'Umayyad practices with which they had disagreed. Furthermore, by systematically championing ḥa-

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[1]See Coulson, History, pp. 30-41; Schacht, Introduction, pp. 29-34; idem, Origins, pp. 58-81.

[2]Schacht, Introduction, p. 33; idem, Origins, pp. 73-77; cf. Coulson, History, pp. 40-41.

dīth as the sole constituent of the Prophetic sunnah, they sought to produce a more uniform practice than had been possible with adherence to the earlier types of local sunnah.[1]

Those who hold that there was a Prophetic sunnah

Despite important differences between them, the theories of Goldziher, Fazlur Rahman, Ahmad Hasan, Ansari, and Guraya are similar in so far as they hold that there was an initial Prophetic sunnah and that the original practice of the Muslim community reflected it. They disagree, however, on the question of how extensive the content of that Prophetic sunnah was. Fazlur Rahman, for example, holds that the content of the Prophetic sunnah was not extensive and, hence, that much of what later Muslims regarded as Prophetic sunnah is spurious, whereas this position is not part of the theories of Ahmad Hasan, Ansari, and Guraya.[2] Gold-

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[1]Schacht, Introduction, pp. 33-34; idem, Origins, pp. 77-81; Coulson, History, pp. 41-43.

[2]See Ignaz Goldziher, Muhammedanische Studien, 2 vols. in 1 (Hildesheim: Georg Olms Verlagsbuchhandlung, 1961), 2: 11-16, 19-21, 29-32; idem, Le dogme et la loi de l'Islam: histoire de développement dogmatique et juridique de la religion musulmane, trans. Félix Arin (Paris: P. Geuthner, 1973), pp. 34-39; Fazlur Rahman, Islam, pp. 53-66; idem, Methodology, pp. 18, 30-31, 44-45; Ahmad Hasan, pp. 25-26, 87, 91-97, 100-101; Ansari, "Early Development," pp. 19-20, 218-224, 253-254; Guraya, pp. 40-41.

I might note that I could find no discussions of Madīnan ᶜamal or the general phenomenon of ᶜamal in early Islamic history in Tyan's work on the history of the Muslim judiciary, although ᶜamal seems clearly to be linked with the development of the Muslim judiciary; Émile Tyan, Histoire de l'organisation judiciaire en pays de l'Islam, rev.

ziher's position on the sunnah of the Prophet, as Fazlur Rahman has pointed out, is an important difference between his theory and those of Margoliouth, Lammens, and Schacht.[1]

The original Prophetic sunnah, according to Goldziher and Fazlur Rahman, was commensurable, initially, with the ḥadīth of the Muslim community. Both this original sunnah, as I have mentioned, and the original ḥadīth that embodied it, however, were not very extensive, certainly nowhere as extensive as the later content of sunnah as reflected in the voluminous ḥadīth literature of the third/ninth century. Furthermore, this original sunnah was also the normative example of the first Muslim community or, in other words, their "living sunnah" or practice. Nevertheless, the content of this original practice expanded over the years. Fazlur Rahman holds that it expanded largely through the ijtihād of the Companions, prominent Successors, and so forth, as they sought solutions for the unprecedented problems they faced. Goldziher holds that there was also extensive borrowing from earlier non-Muslim traditions. Later, ḥadīth were fabricated which embodied the content of the community's practice as it had evolved over the generations. Thus, as Fazlur Rahman puts it, the evolved "living sunnah" and the body of ḥadīth that embodied it became commensurable

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2d ed. (Leiden: E.J.Brill, 1960); for the relationship between ᶜamal and the judiciary, see below, pp. 732-734.

[1]Fazlur Rahman, Islam, pp. 45-47; idem, Methodology, p. 5.

again at a later stage, by virtue of the fabrication and back-projection of ḥadīth. He holds, furthermore, that it was especially the "living sunnah" or ᶜamal of Madīnah that was reflected in the majority of ḥadīth, although numerous ḥadīth were fabricated by the Iraqis as well to preserve the authority of the Iraqi sunnah, which was notably different in some regards. It is worthy of note that, although Goldziher and Fazlur Rahman doubt the authenticity of much of the ḥadīth literature, they hold, nevertheless, that it is a valuable historical reference in terms of which to understand the Qur'ān and study the Prophet's sunnah, because it reflects the early community's understanding of those two sources.[1]

Although Ahmad Hasan, Ansari, and Guraya do not hold to the theory of the fabrication and back-projection of ḥadīth, which characterizes the preceding arguments, there are, nevertheless, important similarities between their theories and those that preceded. All of these theories are alike, I believe, in that they hold that the later Muslim communities of the pre-Shāfiᶜī period regarded the whole of their established practices or "living sunnah's" to be sunnah and that they did not distinguish between those parts of it that had been instituted by the Prophet, those parts of it that had resulted from ijtihād, and so forth. Thus,

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[1]Goldziher, Studien, 2:11-21, 29-32; idem, Le dogme, pp. 31-39, 42-43; Fazlur Rahman, Islam, pp. 53-66; idem, Methodology, pp. 18, 30-31, 44-45.

according to Ahmad Hasan, Ansari, and Guraya, the original practice of the Muslim community, which had embodied the Prophet's sunnah and had been truly a "living sunnah", expanded greatly over the generations prior to ash-Shāfiᶜī. The conclusions of the ijtihād of Companions, Successors, and prominent early fuqahā' had been added to it, but also the policies and practices of 'Umayyad rulers and judges, who were often neither pious or competent. Local communities continued, nevertheless, to regard their practices, supported as they were by local consensus, as embodying the sunnah, without distinguishing or even being able to distinguish between those parts of it that were authentic parts of the Prophet's sunnah and those that were not. Hence, it became increasingly necessary toward the time of ash-Shāfiᶜī to check this "living sunnah" against the criterion of authentically transmitted ḥadīth in order to cut through the established practice, as it were, to extract those parts of it that were authentic and, hence, authoritative from those that were not. Furthermore, their theories continue, such a process of review had only become possible around the time of ash-Shāfiᶜī because it was then that the ḥadīth of all regions were being compiled and the biographical and other sciences of ḥadīth were reaching maturity.[1]

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[1]Ahmad Hasan, pp. 13, 23-26, 87, 94-97, 100-101; Ansari, "Early Development," pp. 19-20, 143, 209, 224, 253-254; Guraya, pp. 40-44.

Some general observations

These theories pertain primarily to the question of what ᶜamal actually was and only incidentally to what the early fuqahā' conceived it to be. They rely heavily on the premise that the 'Umayyads, their judges, and political appointees were largely impious, that they were hostile to or, at best, heedless of following an Islamic ethic, or that they were simply incompetent in matters of religion. Because of this, they had a corrupting effect on the early practice of the Muslim community. Goldziher, for example, who often draws analogies between Jewish and Islamic religious history, compares the Muslim scholars during the 'Umayyad period who sought to elaborate an Islamic ethic despite the 'Umayyads to the Rabbinical scholars who elaborated Jewish law during the period of Roman hegemony, and such scholars, he holds, often sought refuge in Madīnah, which had become a source of guidance and inspiration during the worldly 'Umayyad times for the Muslim "diaspora".[1] The premise of 'Umayyad "impiety", however, was modified considerably in later scholarship. Abbott has shown, for example, that many of the 'Umayyads took an active interest in ḥadīth and in the cultivation of Islamic religious learning, the patronage they gave az-Zuhrī[2] being only one example. Regardless of how sincere

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[1]Goldziher, Studien, 2:29-32.

[2]See above, pp. 57-58.

they may have been in this, one must at least give the 'Umayyads credit, she observes, for having been prudent.[1]

In so far as the theory is concerned that there was no original concept of a Prophetic sunnah that applied to Islamic law and ritual, it has been argued that there is conclusive evidence in the Qur'ān alone that the Prophet's teaching and conduct are to be normative and authoritative for the Muslim community.[2] How extensive the content of this original sunnah was, however, is another question. The theory of the massive fabrication and back-projection of ḥadīth, which is one way of accounting for the voluminous, sometimes contradictory body of ḥadīth literature, relies heavily upon the premise, which is generally accepted or at least not questioned by the writers discussed, that transmission of ḥadīth during the first two centuries of the Islamic era was purely oral.[3] Hence, the massive fabrication and back-projection of ḥadīth was a relatively easy matter, there being no way of establishing fabrication beyond that of impugning the transmitter.

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[1]See Abbott, 2:18-25, 99; 1:9-19, 56.

[2]See, for example, Ahmad Hasan, pp. 48-49, 85-114; Fazlur Rahman, Methodology, pp. 1-9.

[3]See Goldziher, Le dogme, pp. 31-39; but cf. idem, Studien, 2:194-196, 31-32; idem, "Kämpfe um die Stellung des Ḥadīt im Islam," ZDMG 61(1907):864-865; Margoliouth, pp. 65-98; Lammens, pp. 69-81; Schacht, Origins, pp. 140-151 (he speaks here of the "literary" and "pre-literary" periods); Coulson, History, pp. 40-41; Fazlur Rahman, Islam, p. 60; Ansari, "Early Development," pp. 211, 19; cf. Ahmad Hasan, p. 26.

The more recent studies of Abbott, Azmi, Sezgin, and al-Khaṭīb, however, have concluded that from the time of the Companions the transmission of ḥadīth involved the use of writing.[1] Islamic culture assigned high value to memorization--in fact one who did not commit the knowledge he possessed to memory was not considered to be knowledgeable--and memorization was invariably cultivated in the transmission of ḥadīth. Generally, however, the muḥaddith's cultivated memorization and writing simultaneously. Muḥaddith's compiled manuscripts of the ḥadīth they transmitted and committed the content of those manuscripts to memory. Thus, Abbott holds, writing refreshed the muḥaddith's memory, while memorization tended to guarantee the preservation and integrity of the manuscript. For if the muḥaddith's manuscript should be damaged or destroyed, he could restore it on the basis of his memory. Furthermore, his memory enabled him to detect the deletions or interpolations of others.[2]

The early use of writing not only in the transmission of ḥadīth but in all fields of learning in Islamic civilization is a major theme in Sezgin's monumental Geschichte; he frequently points out the misconceptions he believes researchers have made on the premise that writing was not widely used in the early period. Sezgin and Azmi hold, for exam-

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[1]See Abbott, 2:5-87; Azmi, pp. 1-212; Sezgin, 1:53-84; al-Khaṭīb, pp. 139-227.

[2]Abbott, 2:53.

ple, that the 'isnād's in ḥadīth and other transmitted reports ['akhbār], although creating the impression of documenting a purely oral transmission, actually refer to the manuscripts of the transmitters cited in the 'isnād, which constitute the sources of the reports being transmitted. (I mentioned Azmi's observation earlier that, although al-Bukhārī and Muslim draw heavily from the Muwaṭṭa', their 'isnād's cite Mālik only, without ever referring to his work.[1]) In conjunction with this hypothesis, Sezgin has developed a method of analyzing 'isnād's by which he believes it is possible to restore the contents of lost books on the basis of the information contained in later compilations. He has applied this method with interesting results to the works of al-Bukhārī, Muslim, and aṭ-Ṭabarī.[2] Azmi has shown also that the use of manuscripts in the process of transmitting ḥadīth enabled maḥaddith's to use cross-referencing between the works of teachers and their students to determine the sources of errors and fabrications.[3]

The use of writing in the transmission of ḥadīth does not remove the possibility of fabrication. There is no doubt, in fact, that the fabrication of ḥadīth did occur; it is a matter on which muḥaddith's themselves have compiled works.[4]

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[1]See above, pp. 102-103.

[2]Sezgin, 1:82-83; 115-116, 136, 323-325; 378-379; see Azmi, pp. 293-300.

[3]Azmi, p. 231; see also, pp. 203-205, 211.

[4]See, for example, ᶜAbd-ar-Raḥmān ibn ᶜAlī IBN AL-

The question, however, is how extensive that fabrication was and whether or not it was detected. The combined use of writing and memorization in the transmission of ḥadīth in conjunction with the biographical and other sciences of ḥadīth reduces considerably the probability that massive fabrication of ḥadīth went undetected, and it increases the probability greatly that a substantial amount of those transmitted materials that meet the criteria of the sciences of ḥadīth for soundness are actually authentic.

The mere volume of ḥadīth literature, as Abbott and Azmi have pointed out, is deceptive. None of the ḥadīth collections contains ḥadīth exclusively; they contain āthār of the Companions, for example, as well, and the number of āthār which some of the ḥadīth collections contain is substantial. Furthermore, there is considerable repetition in the contents of ḥadīth works, many entries being different transmissions ['isnād's] of similar or identical ḥadīth. Often larger ḥadīth have been broken up and transmitted as numerous smaller ḥadīth. (This type of transmission, which Azmi refers to as the "'aṭrāf method" of transmission, began within the third quarter of the first/seventh century.[1]) Thus, according to Abbott, one can account for the volume of ḥadīth lit-

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JAWZĪ (510-597/1116-1200), Kitāb al-Mawḍūᶜāt, ed. ᶜAbd-ar-Raḥmān Muḥammad ᶜUthmān, 3 vols. (Madīnah: Al-Maktabah as-Salafīyah, 1386/1966), 1:35-54.

[1]Azmi, pp. 185-186.

erature by simple geometric progression, and she does not believe that the volume of ḥadīth literature is unreasonably large.[1] Abbott also concludes on the basis of the high degree of consistency between the early papyri she has studied and the content of later ḥadīth compilations that the muḥaddith's, as a rule, were careful and honest in their transmission of ḥadīth:

> There were comparatively few dishonest and unscrupulous men responsible for an occasional deception or forgery or, as is alleged particularly in the case of sectarians, for wholesale fabrications.[2]

The fact that many ḥadīth are apparently contradictory is not a satisfactory argument in itself to prove that they were fabricated. No doubt, such discrepancies must have resulted in some cases from the errors or willful falsifications of transmitters. But they can be attributed to other reasons as well. It is reasonable, I believe, to hold that real contradiction between some ḥadīth is a consequence of the fact that some of them reflect abrogated precepts of law and others abrogating precepts. In some cases, furthermore, the contents of ḥadīth are not contradictory but merely contrary, such that they are harmonized when assigned their proper contexts. Such apparent contradiction in ḥadīth often reflects, I believe, the textual

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[1]Abbott, 2:16, 44, 65-72, 178, 196, 268, 276; Azmi, pp. 301-305.

[2]Abbott, 2:53, 73-83.

deficiencies and ambiguities of some ḥadīth, especially isolated ḥadīth and reports of actions. From the standpoint of Mālikī legal theory, one of the chief functions of Madīnan ᶜamal is to serve as a criterion by which to remove such ambiguities. Thus, for example, it is used as a criterion by which to discern those ḥadīth that embody the Prophet's public and normative conduct, which he intended to be the people's ᶜamal, from private or exceptional behavior, which in some cases was too rigorous to constitute a normative example. Ḥadīth, however, often transmit both examples, without distinguishing between them.[1]

With regard to Fazlur Rahman's theory that it was chiefly Madīnan ᶜamal which came to be embodied in most ḥadīth that were back-projected, it might be pointed out that a very substantial part of Madīnan ᶜamal is represented by no ḥadīth at all. In my analysis of Mālik's terminology I have observed that a number of the most fundamental precepts of Madīnan ᶜamal that pertain to the Prophetic sunnah, such as some of the basic precepts of zakāh, have not been passed down by ḥadīth either inside or outside Madīnah. Thus, I have suggested that early muḥaddith's, many of whom were in Madīnah, may have used Madīnan ᶜamal as a criterion by which to determine what information needed to be transmitted and which did not. Precepts that were basic parts of ᶜamal may have been regarded as well enough known and es-

[1]See below, pp. 436-448.

tablished that transmitting ḥadīth about them was redundant. It might be added that a number of transmitted ḥadīth seem to take ᶜamal for granted such that the ᶜamal which the ḥadīth speaks about is itself a necessary part of the semantic context of the ḥadīth, without which it cannot be understood. Ḥadīth that speak of how wuḍū' [ritual ablutions] and ṣalāh [daily prayers] are to be performed, for example, take it for granted that the receptor of the message is already familiar with the ᶜamal of wuḍū' and ṣalāh. Thus, one might argue that ḥadīth tend to become textually deficient and ambiguous when removed from the semantic context of ᶜamal, which is the semantic context that the original formulator of the ḥadīth's wording probably took for granted. Thus, for example, the ḥadīth referred to earlier that "the Prophet handed down judgments on the basis of the oath of the plaintiff supported by the testimony of a single witness" can be said to be deficient and ambiguous when isolated from its semantic context of ᶜamal.[1] It would not have been so ambiguous, however, to a community of receptors who were already familiar with that ᶜamal, especially if they knew what the procedure was and that it applied only to money matters, not to cases of libel, murder, and so forth.

The positions of Ahmad Hasan, Ansari, and Guraya that it had not been possible for the early fuqahā' to review

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[1]See above, pp. 141-143.

their local ᶜamal's systematically because the ḥadīth of different regions had not been compiled and the science of ḥadīth had not been fully developed also seem questionable. According to Mālik's biography, he had access to such compilations through his teacher az-Zuhrī and others but refused to transmit them or to use them as a criterion by which to judge Madīnan ᶜamal.[1] Furthermore, ash-Shāfiᶜī's contentions against Mālik in "Ikhtilāf Mālik" pertain almost exclusively to ḥadīth which Mālik himself has transmitted in the Muwaṭṭa' on the authority of the most highly regarded Madīnan transmitters.[2] The difference between ash-Shāfiᶜī and Mālik, therefore, is one of theory. Mālik studies ḥadīth against the background of Madīnan ᶜamal, and ash-Shāfiᶜī studies Madīnan ᶜamal against the background of ḥadīth. If a legal text is ambiguous, Mālik removes its ambiguity by placing it within the semantic context of ᶜamal, whereas for ash-Shāfiᶜī it is the apparent [ẓāhir] or literal meaning of the text itself which one is to follow. He no longer regards Madīnan ᶜamal to be a valid semantic context for the ḥadīth.

Perhaps, the most important point of difference between the conclusions of my research and the preceding theories in general is that my analysis of Mālik's terminology in the Muwaṭṭa' indicates that Mālik did draw a distinction

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[1]See above, pp. 76-85. [2]See above, pp. 341-343.

between parts of Madīnan ᶜamal that he regarded as having been instituted by the Prophet and for which he uses his sunnah terms and parts of ᶜamal that resulted from ijtihād. Thus, it does not appear that Mālik regarded the totality of Madīnan ᶜamal as constituting a "living sunnah". My analysis of Mālik's terminology indicates, furthermore, that Mālik draws a distinction between those parts of Madīnan ᶜamal that he regards to be sunnah and those parts of ᶜamal that resulted from ijtihād but are supported by Madīnan consensus. Hence, it does not appear that matters of ijtihād upon which consensus was reached were regarded to have become part of the "living sunnah" by virtue of that consensus. Finally, my analysis indicates that not all parts of Madīnan ᶜamal were supported by the consensus of all Madīnan fuqahā', and it appears, furthermore, that Mālik drew a distinction between those types of ᶜamal that were supported by local consensus and those that were not. The most common term in the Muwaṭṭa', for example, AN [al-'amr ᶜindanā] appears to stand for types of ᶜamal that do not have consensus, while terms like AMN [al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā]--the second most common term--A-XN [al-'amr al-ladhī lā 'khtilāf fīhi ᶜindanā], and AMN-X [al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā wa 'l-ladhī lā 'khtilāf fīhi] stand for types of Madīnan ᶜamal that are supported by consensus.[1]

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[1]See below, pp. 419-434.

Finally, the preceding theories present a very uniform interpretation of the emergence of the local practices of the important centers of the early period. They hold, for example, that what was essentially and qualitatively true for the emergence of one of these local practices tended to hold true for the others. What was true for the emergence of Kūfan practice, for example, was essentially true for the emergence of Baṣran or Makkan practice, the fundamental difference being geographic, i.e. the fact that they constitute separate localities. It seems to me that the evidence upon which such conclusions have been drawn is not sufficient. Rather such conclusions require far more detailed and systematic study.

Theories Pertaining Directly to Mālik and His Legal Method

There is general agreement in modern literature on Islamic law in Western languages that Madīnan ᶜamal is Mālik's most authoritative legal argument.[1] Goldziher pointed out quite early that ra'y was also an important part of Mālik's legal reasoning, and he holds that the proponents of ḥadīth persistently counted Mālik to be of the adherents of ra'y.[2] Similarly, Schacht and Guraya conclude that ᶜamal

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[1]Goldziher, Studien, 2:141, 214-217; Schacht, Origins, pp. 312-314, 58-59, 63; Fazlur Rahman, Methodology, p. 13; Ahmad Hasan, pp. 100-101; Ansari, "Early Development," pp. 21, 184-185, 243; Guraya, pp. 77, 89, 147.

[2]Goldziher, Ẓāhiriten, pp. 3-5, 20 (note 1); cf. idem, Studien, 2:215-217.

and ra'y are the two primary constituents of Mālik's legal reasoning; according to Schacht, that holds true for the Madīnan legal method in general. Schacht concludes, however, that Mālik's technical legal thought is considerably less developed than that of his Iraqī contemporaries.[1]

I believe that these writers are essentially correct in identifying ᶜamal and ra'y as the most important parts of Mālik's legal reasoning. I believe, however, that Mālik divided Madīnan ᶜamal into different categories and that he distinguished between those parts which he regarded to be Prophetic sunnah, those parts which he regarded to be the products of later ijtihād which were supported by Madīnan consensus, and those parts of Madīnan ᶜamal that were not supported by a local consensus.[2] Similarly, the ra'y to which Mālik subscribed may be analyzed more accurately, I believe, in terms of the Mālikī concepts of qiyās, istiḥsān, sadd adh-dharā'iᶜ, and al-maṣāliḥ al-mursalah. Mālik may not use the terms himself, or, if he does use them occasionally, he may not use them frequently or systematically; nevertheless, the concepts that they represent appear to be part of his system of reasoning.[3]

Furthermore, ᶜamal and ra'y seem generally to have different functions in Mālik's legal reasoning. He uses

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[1]Schacht, origins, p. 312; Guraya, p. 77.

[2]See below, pp.409 -434. [3]See above, pp. 209-279.

ᶜamal to establish the validity, content, and purpose of the precepts and principles of law to which he subscribes. In this regard, ᶜamal constitutes an authoritative non-textual source of law in terms of which Mālik rejects, interprets, or elaborates upon the textual sources to which he subscribes. The several-faceted ra'y to which Mālik subscribes, however, is his vehicle of ijtihād, which is primarily, although not exclusively, used in applying the law to specific problems, with or without precedent. Mālik also makes reference to personal ra'y in the Muwaṭṭa', however, when stating which of those Madīnan precepts he subscribes to that were not supported by Madīnan consensus and regarding which there were different points of view within the city. Thus, for example, Mālik frequently refers to personal ra'y in the context of discussing AN's.[1]

Mālik exercises ra'y on the basis of the precepts and principles that are established through Madīnan ᶜamal. Thus, ᶜamal is the referent of Mālik's ra'y. The Muwaṭṭa', as I have suggested, is essentially an ᶜamal-book, containing the fundamental precepts upon which ra'y is to be done. Although there are several examples of Mālik's ra'y in the Muwaṭṭa'; the Mudawwanah, "Mawwāzīyah", "Wāḍiḥah", "ᶜUtbīyah", and other early compendia are the proper sources for studying Mālik's ra'y because they contain the greater part

[1]See below, pp. 428-431; 731-760.

of his ijtihād.[1] I might note that Goldziher observed this characteristic of the Muwaṭṭa' as being an ᶜamal source book and a referent of ijtihād. The Muwaṭṭa', he holds, is not, properly speaking, a collection of ḥadīth [corpus traditionum] but rather a compendium of law [corpus juris], its purpose being to set forth the precepts, rituals, and normative practices of Islam on the basis of Madīnan consensus and the sunnah that was being practiced in Madīnah. It was intended to serve, he continues, as a criterion by which to judge other matters that were doubtful, less well-established, and points of difference. It was not Mālik's purpose in the Muwaṭṭa' to sift through and collect ḥadīth, and, although the work contains ḥadīth, it is essentially a book of sunnah, not a collection of ḥadīth.[2]

In assessing Schacht's statement that Mālik's ra'y is technically less developed than that of his Iraqi contemporaries, it is important to keep in mind the distinction between concepts and terms which I discussed earlier.[3] Schacht may well be correct in as far as the emergence of technical terminologies and the systematic analysis of legal reasoning may have been more developed in Kūfah. Of course, one should keep in mind also that the use of terminology is one of the conspicuous and interesting characteristics of

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[1]For data on these compendia, see above, pp. 107-120.

[2]Goldziher, Studien, 2:213-214.

[3]See above, pp. 14-20.

Mālik's Muwaṭṭa', and, according to my analysis, there is system in Mālik's terminology.[1] Nevertheless, aside from these questions of terminology and articulate analytical thought, it is a quite independent consideration as to whether or not Mālik's legal reasoning constituted a coherent system and whether or not it was conceptually well-developed. For, as I have pointed out, coherent and conceptually well-developed intellectual systems can in fact exist and appear even to come into existence independent of the terminologies and methods of analytical thought that explain them systematically. Furthermore, terminologies and methods of analytical reasoning can be both beneficial and detrimental. Terminologies and methods of analytical reasoning may clarify the concepts of an intellectual system, make them easy to identify and work with, and permit one to get a comprehensive grasp of the intellectual system with relative ease. At the same time, however, terminologies and methods of analysis that are misconceived, foreign, or otherwise ill-suited and inadequate for the systems to which they are applied may render those systems more obscure, distort and confuse the concepts of the system, and impede one's getting a comprehensive grasp.[2]

Finally, it should be noted with regard to the analysis of ᶜamal in Western languages that Guraya has conclud-

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[1]See below, pp. 523-529. [2]See above, pp. 11-20.

ed that it is the contemporary ᶜamal of Madīnah which Mālik regards to be authoritative and not earlier Madīnan ᶜamal. Thus, he concludes, Mālik prefers the contemporary ᶜamal of Madīnah to earlier types of contrary ᶜamal that are witnessed in the text of the Muwaṭṭa'.[1] Ahmad Hasan reaches a somewhat similar position; he holds that the "agreed upon practice" of Madīnah to which Mālik subscribes had not come to be "agreed upon" until Mālik's generation.[2] Guraya reaches his conclusion on the basis that Mālik often cites in the Muwaṭṭa' reports of actions of the Prophet or early Madīnans, and then Mālik indicates that the ᶜamal of Madīnah is contrary to those reported actions. As pointed out earlier, however, it is part of Mālikī legal theory and apparently part of Mālik's legal reasoning that such reports of actions are highly ambiguous and are regarded as insufficient to indicate obligatory or normative conduct.[3] Thus, Mālik probably did not regard those reports of isolated actions even to indicate the normative behavior of the persons reported. Ahmad Hasan and Guraya also reach their conclusions on the basis that Mālik indicates in the Muwaṭṭa' that there were differences of opinion in Madīnah on several matters, and ash-Shāfiᶜī states that explicitly. The conclusion that "agreed upon practice" does not occur prior to

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[1]Guraya, pp. 89, 147.

[2]Ahmad Hasan, pp. 170-171; cf. Guraya, p. 129.

[3]See above, pp. 188-195.

Mālik, however, is based on the erroneous premise that Madīnan ᶜamal and Madīnan 'ijmāᶜ are coterminous.

Theories on Mālik's terminology

Goldziher does not analyze Mālik's terminology in the Muwaṭṭa'; he notes, however, that terms like AMN [al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā] and explicit references to the learned people of Madīnah [e.g., ẋdIb, -zẋIb] are indications of the 'ijmāᶜ of Madīnah, which is a chief underpinning of Mālik's reasoning.[1] Schacht also holds that Mālik's various ᶜamal and 'amr terms in the Muwaṭṭa' like AN, AMN, A-XN, refer to Madīnan ᶜamal; he does not, however, analyze them beyond that.[2] My analysis confirms these observations, as far as they go.

Fazlur Rahman also discusses Mālik's terminology briefly and holds that Mālik's term AMN stands for sunnah in the sense of the "living sunnah" of the community. Thus, he concludes that this term is an instance of how in the early Muslim community the concepts of sunnah and consensus merged with each other.[3] Similarly, Ansari holds that Mālik's term S-XN [as-sunnah al-latī lā 'khtilāf fīhā ᶜindanā] is equivalent to AMN, and he holds that the explicit indication of consensus in the term S-XN shows that the authority of the precept to which it pertains arises from its hav-

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[1]Goldziher, Studien, 2:214. [2]Schacht, Origins, pp. 62-63.

[3]Fazlur Rahman, Methodology, pp. 18, 13.

ing the support of Madīnan consensus.[1] Ahmad Hasan holds in like fashion that terms Mālik uses, such as S-XN, MḌS [maḍat as-sunnah], SN [as-sunnah ᶜindanā], AN, AMN, A-XN, are equivalents and can be used "interchangeably". Thus, he concludes that Mālik regarded Madīnan ᶜamal and the sunnah to be equal.[2] Guraya observes that Mālik never uses sunnah terms in connection with decisions of caliphs, governors, or judges; he does not, however, pursue this important observation further or conclude that there is any basic difference between Mālik's sunnah and 'amr terms.[3]

My analysis of Mālik's terminology in the Muwaṭṭa' does not confirm the theory that the terms are interchangeable. On the contrary, it indicates that there are fundamental differences between the sunnah and 'amr terms and that the terms also indicate whether or not the precepts to which they pertain are supported by Madīnan consensus.[4]

Modern Literature in Arabic

Most of the contemporary Arabic works that I consulted on Islamic legal theory or the history of Islamic law do not contain elaborate discussions on Madīnan ᶜamal or Mālik's legal reasoning in general. What observations they do make, however, are often taken from Mālikī legal theory

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[1]Ansari, "Early Development," p. 145.

[2]Ahmad Hasan, pp. 100-101. [3]Guraya, pp. 93-94.

[4]See below, pp. 419-433.

and are worthy of note, even though they do not give a comprehensive picture of Mālik's concept of ᶜamal. Thus, for example, Madkūr, Shaᶜbān, and as-Sibā'ī note that Mālik uses Madīnan ᶜamal as a criterion in terms of which to accept, reject, or interpret isolated ḥadīth.[1] Al-Khuḍarī Bēk, who follows traditional legal theorists closely in his work, mentions the different categories of Madīnan ᶜamal and cites some of the comments of al-Qāḍī ᶜAbd-al-Wahhāb,[2] the important, early Mālikī legal theorist.[3] Ḥasb -Allāh observes, for example, that Mālik regarded the conclusions of qiyās based on well-established precepts as taking priority over isolated, irregular ḥadīth;[4] Shalabī holds, similarly, that Mālik's principle of granting priority to qiyās over isolated, irregular ḥadīth is cognate to his use of ᶜamal as a criterion against which to evaluate ḥadīth.[5]

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[1]Muḥammad Sallām Madkūr, Madkhal al-Fiqh al-'Islāmī (Cairo: Ad-Dār al-Qawmīyah li-ṭ-Ṭabāᶜah wa-'n-Nashr, 1384/1964), pp. 40 ff.; Muṣṭafā Ḥusnī as-Sibā'ī, As-Sunnah wa Makānatuhā fī 't-Tashrīᶜ al-'Islāmī (Cairo: Maktabat Dār al-ᶜUrūbah, 1961), p. 392; Zakī-ad-Dīn Shaᶜbān, p. 67; cf. 'Abū Zahrah, Mālik, pp. 290-294, 300-305.

[2]See above, pp. 116-117, n. 3.

[3]Muḥammad al-Khuḍarī Bēk, 'Uṣūl al-Fiqh (Egypt: Al-Maktabah at-Tijārīyah al-Kubrā, 1391/1971), pp. 205 ff.

[4]ᶜAlī Ḥasb -Allāh, 'Uṣūl at-Tashrīᶜ al-'Islāmī (Egypt: Dār al-Maᶜārif, 1391/1971), pp. 55 ff.

[5]Muḥammad Muṣṭafā Shalabī, Al-Madkhal fī 't-Taᶜrīf bi-'l-Fiqh al-'Islāmī (Egypt: Maṭbaᶜat Dār at-Ta'līf, 1385/1966), pp. 146 ff. and 177 ff.

Al-Kawtharī states in his treatment of the stipulations that 'Abū Ḥanīfah placed upon ḥadīth that 'Abū Ḥanīfah often made use of Kūfan ᶜamal in the examination of ḥadīth in a manner similar to the way that Madīnan ᶜamal was used.[1]

The most useful contemporary Arabic studies pertaining to Mālik's legal theory that I have found, however, are those of Muṣṭafā az-Zarqā, ᶜAlāl al-Fāsī, 'Abū Zahrah, ad-Dawālībī, and the theses of Nūr-Saif on ᶜamal and of ar-Rasīnī on the Seven Fuqahā' of Madīnah.[2] Of these works, the best and most comprehensive with regard to Mālik's legal theory is by far 'Abū Zahrah's Mālik. Since I have drawn upon these works throughout my dissertation, however, I see no need to go into their arguments here.

Al-Laith ibn Saᶜd and Early Polemical Writings

The Letters of Mālik and al-Laith ibn Saᶜd

Al-Qāḍī ᶜIyāḍ transmits in Tartīb al-Madārik a brief letter that Mālik is reported to have written to al-Laith ibn Saᶜd[3] after learning that al-Laith had given fatwā's in Egypt contrary to the ᶜamal of Madīnah. ᶜIyāḍ holds that the let-

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[1]Al-Kawtharī, p. 35. For the Ḥanafī stipulations on the acceptance of ḥadīth as legal arguments, see appendix 1.

[2]I have been told that Dr. ᶜAbd-ar-Raḥmān Bā-Bakr al-Ḥasan of the University of Kharṭūm's College of Law wrote his doctoral dissertation at Al-'Azhar on ᶜamal. My efforts to get a copy through Cairo have not yet been successful.

[3]For data on al-Laith ibn Saᶜd, see above, p. 83, n. 5.

ter has been transmitted authentically. After Mālik's letter, ᶜIyāḍ includes a brief portion of al-Laith's reply; a much fuller version of al-Laith's response, which appears to be complete, is contained in Ibn Qayyim's 'Iᶜlām; ᶜIyāḍ has apparently deleted al-Laith's criticisms.[1]

Mālik's letter, if authentic, is valuable because it is one of the most explicit statements on ᶜamal attributed to him; hence, it helps--despite its terseness--to clarify his conception of Madīnan and non-Madīnan ᶜamal. Although Mālik's conception of ᶜamal is the subject of the next chapter, I will discuss his letter here, since it should be studied within the context of al-Laith's response. Al-Laith's response, which is more lengthy and detailed, reflects likewise his own conception of Madīnan ᶜamal and the authority of the well-established ᶜamal's of Syria [ash-Shām], Ḥimṣ [Homs], Egypt, and Iraq. The letters, as 'Abū Zahrah observes, contain ample evidence of how Mālik, his students, and friends corresponded with each other on matters of law.[2] What is also very noteworthy about al-Laith's letter, however, is that it indicates, as I will point out, that there

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[1]ᶜIyāḍ, 1:64-65; Ibn Qayyim, 3:107-114. I have also used the following edition: Muḥammad ibn 'Abī Bakr IBN QAYYIM AL-JAWZĪYAH, 'Iᶜlām al-Muwaqqiᶜīn ᶜan Rabb al-ᶜĀlamīn, ed. Muḥammad Muḥyī-ad-Dīn ᶜAbd-al-Ḥamīd, 4 vols. (Egypt: Maṭbaᶜat as-Saᶜādah, 1374/1955), 3:94-100. References to this edition will be designated by "Ibn Qayyim, (Saᶜādah)".

[2]'Abū Zahrah, Mālik, p. 134.

is a difference between Madīnan ᶜamal in general and the 'ijmāᶜ of Madīnah. What, in fact, al-Laith is saying in his response is that he is among the most rigorous of persons in following Madīnan 'ijmāᶜ but that he has the prerogative to differ with Madīnan ᶜamal on those points concerning which there have been differences of opinion within Madīnah itself.

Although I am discussing these letters within the context of early polemical writings pertaining to ᶜamal, it should be pointed out that neither letter is polemical, even though they discuss points of difference. Brunschvig has noted that Mālik's letter is essentially an exhortation and that its defense of ᶜamal is hardly as developed as the arguments of later Mālikī polemicists.[1] In assessing the letters, however, it is important to keep in mind that Mālik and al-Laith agree on fundamentals; al-Laith, for instance, does not question Madīnah's priority over other cities and the authoritativeness of Madīnan 'ijmāᶜ. On the contrary, he describes himself as the staunchest supporter of Madīnan 'ijmāᶜ. Thus, Mālik is not writing to an antagonist whom he intends to win over; rather he is writing to an old friend who, at least in the past, has always shared his opinion on ᶜamal. In terms of legal theory, as 'Abū Zahrah points out, al-Laith's attitude remains virtually

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[1]Brunschvig, pp. 381, 383.

identical to Mālik's. Al-Laith has not argued like ash-Shāfi^{c}ī will a generation later that Mālik has failed to follow isolated ḥadīth. Both the letters of Mālik and al-Laith insist upon the importance of following the ^{c}amal of the Companions; they indicate, furthermore, that studying the opinions of the Companions and Successors is a fundamental part of the study of fiqh. And, as 'Abū Zahrah notes, al-Laith has based each of his arguments against Mālik regarding specific points on the ^{c}amal of Companions and Successors.[1]

Mālik's letter

It is apparent from the text of al-Laith's response that Mālik's letter as transmitted by ^{c}Iyāḍ is not complete;[2] in fact, it would appear that Mālik's original letter was considerably longer and that the comments about ^{c}amal and al-Laith's giving fatwā's contrary to Madīnan ^{c}amal may have been only an afterword. Al-Laith begins his response by recounting the contents of Mālik's letter.[3] He states that Mālik had mentioned that he was in good health and doing well, which al-Laith is pleased to hear. Furthermore, Mālik's letter had contained other documents [kutub] containing legal opinions of Mālik which al-Laith had come by in-

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[1]'Abū Zahrah, Mālik, pp. 133-134. [2]cf. Ibid., p. 124,n.1.

[3]Perhaps, recounting the contents in this manner of the letter one is answering was a literary convention by which the recipient could verify that the contents of his letter had been received in full and by which the recipient could also identify which of his earlier letters this res-

directly and had sent back to Mālik to have verified and corrected. Mālik had corrected these documents, made some comments upon them, and returned them to al-Laith in this letter with his seal [khātam] affixed to them. Mālik had also made comments to al-Laith and given him advice in the letter regarding al-Laith's desire, which he had written to Mālik about earlier, to have whatever he gets from Mālik corrected and verified. Finally, al-Laith states that Mālik had mentioned that word had reached him that al-Laith had given fatwā's contrary to Madīnan ᶜamal, and al-Laith alludes very clearly to the comments in Mālik's letter as transmitted in ᶜIyāḍ, generally using identical wording.[1] None of the other matters, however, is part of ᶜIyāḍ's transmission of Mālik's letter.

After informing al-Laith that word has reached him that al-Laith has given fatwā's in Egypt contrary to Madīnan ᶜamal ["mā ᶜalaihi jamāᶜat an-nās ᶜindanā wa bi-baladinā 'l-ladhī naḥnu fīhi"], Mālik exhorts al-Laith that he carries great responsibility before God because of his status in Egypt and the reliance of the Muslims of Egypt upon his fatwā's. Hence, Mālik states, "It is only right that you fear God with respect to yourself and follow that [namely, Madīnan ᶜamal] which in following you can hope to attain salvation ["wa tattabiᶜa mā tarjū 'n-najāh bi-'ttibāᶜihī"]."

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ponse was an answer to.

[1]Ibn Qayyim, (Saᶜādah), 3:94-95.

Mālik cites two Qur'ānic verses, the first of which speaks of the excellence of the early Makkan and Madīnan Muslims and those who follow their examples closely and the second of which speaks in general terms about the excellence of those who follow the revelation and repent from following wrongful ways.[1] Mālik then states that all people are dependent upon [tabᶜ] the people of Madīnah by virtue of the unique relationship which they had to the Prophet. Madīnah was the base of his hijrah, and it was here, Mālik continues, that those parts of the Qur'ān were revealed that set down the law, declaring what was permissible [ḥalāl] and what was forbidden [ḥarām]. The people of Madīnah were present during the revelation; the Prophet would give them commands, and they would obey them; the Prophet would establish the sunnah, and they would follow it, which continued, Mālik adds, until the Prophet's death.

Alluding to the early Madīnan caliphs, Mālik states that after the Prophet's death those persons assumed control of the affairs of the community who followed the Prophet more closely than anyone else in his community ['ummah]:

> When problems presented themselves for which they already had knowledge [from the Prophet], they put into practice [what they already knew]. When they did not have knowledge of a matter, they inquired [of others]. They would then follow, on the basis of their ijtihād and their recent experience with the Prophet [ḥadāthat ᶜahdihim], those opinions which they came to know of

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[1] Qur'ān, 9:100; 39:18.

> that were strongest ['aqwā]. And if anyone held a contrary opinion or said that another opinion was even stronger and, therefore, preferable, he would put aside that opinion, nevertheless, and would make the contrary opinion his ᶜamal ["wa 'in khālafahum mukhālif 'aw qāla 'mru' ghairuhū 'aqwā minhu wa 'awlā, taraka qawlahū wa ᶜamila bi-ghairihī"].

The Madīnan Successors, Mālik continues, proceeded along this same course as the Companions, and they continued to follow the different aspects of the sunnah [tilka 's-sunan] which had been established earlier.

Thus, Mālik concludes:

> Whenever a matter [of Islamic law] is predominant [ẓāhir] in Madīnah and followed in the ᶜamal, I do not believe that anyone has the prerogative to go against it on the basis of the limited part of this same legacy which they possess, this legacy which none may take for himself or lay claim to. If the inhabitants of the various regions [of the Islamic empire] ['ahl al-'amṣār] should begin to say, "But this is the ᶜamal of our city" or "This is what those who preceded us had always been doing" ["wa hādhā 'l-ladhī maḍā ᶜalaihi man maḍā minnā"], they would not in doing that be following the surest and most reliable course ["lam yakūnū min dhālika ᶜalā thiqah"], nor would they be doing that which is permissible for them ["wa lam yakun lahum min dhālika, al-ladhī jāza lahum"].

Before concluding the letter, Mālik states to al-Laith that he hopes that his only motive in writing it has been to give counsel for the sake of God alone. Mālik is implying by this, I believe, that he feels he has been sincere in counselling al-Laith to adhere more closely to Madīnan ᶜamal and hopes that he has not been motivated to give that counsel out of a sense of parochialism or party spirit.

This letter, as 'Abū Zahrah has observed, indicates very explicitly how authoritative Mālik must have regarded

Madīnan ᶜamal to be.[1] Mālik has objected in very strong terms to one's opposing those matters of law that constitute predominant [ẓāhir] ᶜamal in Madīnah. In this regard, all other Muslim regions, he believes, should follow Madīnah. It is only Madīnan ᶜamal which he regards to be valid, which is a chief point of difference between him and al-Laith. Mālik does not believe that the cumulative legacy of Madīnah has been or can be transferred to any other city. Using ᶜamal as the authoritative source of law is such a fundamental part of Mālik's reasoning that when he refers to what arguments others might bring (or might have brought) in opposing Madīnan ᶜamal, he speaks of them too as basing their arguments on the ᶜamal of their regions. In his response to Mālik, al-Laith, as has been pointed out, will base his arguments on the ᶜamal of other regions. Al-Laith, however, will argue prior to that that the ᶜamal of these regions must also be regarded as valid, when it goes back to the Prophet's Companions. In light of the reports that Mālik refused al-Manṣūr's offer to make the Muwaṭṭa' the standard for all regions of the empire, because Mālik believed it would be too difficult to make the people change their practices and because these regional practices had some validity by virtue of having been instituted by the Companions,[2] one wonders if Mālik was not convinced by al-Laith's argument.

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[1] Abū Zahrah, Mālik, pp. 331-332. [2] See above, p. 100.

It is also important to note that, according to Mālik, there had not always been complete consensus among the Companions on those matters of ijtihād which the Madīnan caliphs had instituted as ᶜamal. Nevertheless, despite their contrary opinions those Companions who disagreed would follow the ᶜamal which the caliphs had instituted. This would appear to be in keeping with ᶜAlāl al-Fāsī's hypothesis that the authority of the group ijtihād which underlies much of Madīnan ᶜamal was not that of an infallible, total consensus but that of group ijtihād supported by executive order, which was legally binding even though one might disagree with it.[1] Al-Laith, however, will claim the prerogative to differ with those parts of Madīnan ᶜamal regarding which there were differences of opinion among the learned people of Madīnah, and it may be that Mālik is implying by this comment that he believes that one should follow Madīnan ᶜamal even in those matters regarding which there were differences of opinion in Madīnah.

In this letter Mālik mentions two sources of Madīnan ᶜamal: 1) the sunnah of the Prophet and 2) the ijtihād of those who came into authority after the Prophet, such as prominent Companions and Successors. It is clear, furthermore, that he believes that the content of Madīnan ᶜamal as established by the Prophet and preserved and elaborated by

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[1]See above, pp. 195-204.

the Companions and Successors, who make up the generation prior to Mālik's own, has been kept in tact; thus, he believes that contemporary ᶜamal is in direct continuity with the Madīnan ᶜamal of the past.

The concept of Prophetic sunnah is quite explicit in the letter. According to Mālik, the excellence of the people of Madīnah and their ᶜamal comes as a consequence of their obedience to the Prophet and their careful adherence to the sunnah which he had laid down for them. He also stresses the importance of their having been the direct recipients of his teachings and injunctions and the fact that they were witnesses of what transpired during the Prophet's career in Madīnah. Similarly, Mālik believes that the Madīnan caliphs continued to follow the Prophet's sunnah closely; he describes them, in fact, as those who of all the 'ummah followed the Prophet most closely, and he pictures the Madīnan Successors who took their place as having continued to follow the same example.

The excellence of the ijtihād of the Madīnan caliphs, which constitutes one of the sources of ᶜamal, is a consequence, according to Mālik, of the extensive knowledge they had of the Prophet's teaching, their access to other Companions of whom they could inquire about matters of which they had no knowledge, and their recent experience of having been with the Prophet and learned Islam at first hand. Thus, he believes, they were capable of discerning those opinions in

ijtihād which were strongest and most worthy of being followed, that is, of being incorporated into ᶜamal. Mālik's conception of the authoritativeness of the prominent Companions by virtue of their first hand knowledge of the Prophet's sunnah is, as 'Abū Zahrah has pointed out, very clear in this part of the letter, and it is probably the premise which underlies Mālik's extensive reliance upon the ᶜamal, āthār, and fatwā's of the Companions as a source of Islamic law.[1]

Al-Laith's response

Al-Laith's response is courteous and amiable; as I mentioned earlier, it is not a polemical response. He begins and ends by affirming his high esteem for Mālik; at the end of the letter, he urges Mālik, for example, to continue to correspond with him, to tell him news about himself and his family, and to be sure to let him know if there is any way that he can be of help to Mālik or Mālik's friends and family, which al-Laith says gives him great pleasure to do. Although having disagreed in his letter with Mālik on some questions, al-Laith ends by wishing Mālik long life so that the people will continue to benefit from his knowledge, fearing the great loss that may come about when Mālik is gone.[2]

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[1]'Abū Zahrah, Mālik, pp. 133-134; see above pp. 161-170.

[2]Ibn Qayyim, (Saᶜādah), 3:94-95, 99-100.

Al-Laith emphasizes at several points in the letter his basic agreement with what Mālik has said. He acknowledges, for example, that he should fear God with respect to himself because of the reliance of those around him on his legal opinions. He agrees that all people, as Mālik has said, are dependent upon [tabᶜ li] the people of Madīnah in matters of religious knowledge by virtue of the special relationship of the people of Madīnah to the Prophet and the extensive knowledge he imparted to them. He assures Mālik that Mālik's advice has met with his approval and left a good impression upon him. Al-Laith then states:

> I have come across no one who is regarded as having knowledge who has a greater aversion than I to making irregular and erratic fatwā's [shawādhdh al-futyā] nor who holds in greater esteem than I the Madīnan ᶜulamā' of the past nor who follows more closely those of their fatwā's upon which they reached consensus ["wa lā ākhadh li-futyāhum fīmā 'ttafaqū ᶜalaihi"].[1]

Al-Laith shows the same aversion to irregular [shādhdh] legal opinions that one sees in 'Abū Yūsuf,[2] and he has indicated by these prefatory remarks that he does not regard the fatwā's that he has given that are contrary to parts of Madīnan ᶜamal and about which Mālik has written him to be irregular or erratic. On the contrary, he will argue that they are based on types of ᶜamal which the Companions instituted outside Madīnah during the caliphates of 'Abū Bakr, ᶜUmar, and ᶜUthmān which were not challenged by those ca-

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[1]Ibn Qayyim, (Saᶜādah), 3:95.

[2]See below, pp. 453-459.

liphs. By indicating, furthermore, that he is the most rigorous person he knows in adhering to the 'ijmā^c of Madīnah, al-Laith clearly seems to be saying that those parts of Madīnan ^camal that he has differed with are not parts of Madīnan 'ijmā^c, which supports my hypothesis that Madīnan ^camal and Madīnan 'ijmā^c are not coterminous.[1] Al-Laith will allude in the remainder of the letter, in fact, to the differences of opinion of such prominent Madīnan fuqahā' as az-Zuhrī and Rabī^cah regarding some parts of Madīnan ^camal. This passage also indicates that al-Laith was aware that parts of Madīnan ^camal had originated in the fatwā's of prominent Madīnan ^culamā', and he gives no indication that he regarded their fatwā's, even when supported by local consensus, to constitute sunnah.

After setting forth his general agreement with Mālik, al-Laith begins to present his argument regarding his chief point of difference with Mālik, namely, that some types of the ^camal of regions outside Madīnah are also valid:

> But many of these same Companions who were among the first to embrace Islam ["ulā'ika 's-sābiqīn] left [Madīnah] to perform jihād in behalf of God and His religion, seeking God's pleasure. They put armies together, and the people gathered together around them. They made the Book of God and the sunnah of His Prophet well known to [these people], not concealing from them anything of which they had knowledge. In every one of their armies [jund], there was a special group [ṭā'ifah] who taught the Book of God and the sunnah of His Prophet and who performed ijtihād on the basis of personal opinion [ra'y]

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[1]See below, pp. 427-431.

regarding those matters which the Qur'ān and sunnah had not made clear to them ["fīmā lam yufassirhu lahum al-Qur'ān wa 's-sunnah"]. 'Abū Bakr, ᶜUmar, and ᶜUthmān--whom [all] the Muslims chose to be their leaders--preceded them in doing this ["taqaddamahum ᶜalaihi"]. Nor was it like these three to neglect or be heedless of the affairs of the Muslim armies ["wa lam yakun . . . muḍīᶜīn li-'ajnād al-muslimīn wa lā ghāfilīn ᶜanhum"]; on the contrary, they used to write to them about the slightest thing ["fī 'l-'amr al-yasīr"], in order to see to it that the religion was established properly and to take precautions against differences developing around the Book of God and the sunnah of His Prophet. Thus, they set aside no matter which the Qur'ān had made clear or which had been the ᶜamal of the Prophet, may God bless him and give him peace, or regarding which they had consulted together after he had gone, without teaching them to [their armies] ["fa-lam yatrukū 'amran fassarahū 'l-Qur'ān 'aw ᶜamila bihī 'n-nabī, ṣallā 'Llāh ᶜalaihi wa sallama, 'aw i'tamarū fīhi baᶜdahū 'illā ᶜallamūhumūhu"].[1]

Al-Laith then draws the conclusion that follows from this premise:

Thus, whenever there is a matter which constituted the ᶜamal of the Companions . . . in Egypt, Syria, or Iraq during the caliphates of 'Abū Bakr, ᶜUmar, or ᶜUthmān which they continued to perform until their deaths, the caliphs not having commanded them to do otherwise, I do not regard it as permissible today for Muslim armies to initiate [yuḥdithū] something else which had not been the ᶜamal of those of the Prophet's Companions who were their predecessors or the Successors who came after them ["lam yaᶜmal bihī salafuhum min 'aṣḥāb Rasūl Illāh . . . wa 't-tābiᶜīn lahum"], despite the fact that the Companions of God's Messenger . . . disagreed in the fatwā's they gave on many points after his death. And were it not that I know already that you have knowledge of [these points of difference], I would write them down for you. Then, the Successors--Saᶜīd ibn al-Musayyab and others of his stature--disagreed sharply ['ashadd al-ikhtilāf] on [some] questions after the Companions of God's Messenger, may God bless him and give him peace, had gone.[2]

Al-Laith refers to the sunnah of the Prophet explic-

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[1]Ibn Qayyim, (Saᶜādah), 3:95. [2]Ibid., 3:95-96.

itly in the first of these passages; interestingly enough, he refers later in the passage to the Prophet's sunnah as "that which had been the ᶜamal of the Prophet" [(mā) ᶜamila bihī 'n-nabī], which could be interpreted as an indication that he conceived of the sunnah as the normative behavior of the Prophet. The notion that the āthār and fatwā's of the Companions constitute an authoritative source of law is the central feature of al-Laith's argument. Since he is convinced that the first three caliphs watched closely over the instituting of ᶜamal in the provinces, he does not believe that anyone has the right in his time to object to what these caliphs did not object to in their own time. It is clear, of course, that al-Laith does not question the continuity of these sorts of ᶜamal, just as he does not question the continuity of Madīnan ᶜamal. He must also have been confident that there was some means by which one could determine what those parts of the ᶜamal were that had been instituted during the caliphates of the first three caliphs and to which they had never objected. In taking such a position, al-Laith is markedly different from 'Abū Yūsuf, ash-Shāfiᶜī, and others who will question the continuity of ᶜamal and doubt that its source can be verified.[1]

Perhaps al-Laith is referring to attempts by the government to institute more uniform ᶜamal in the provinces

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[1]See below, pp. 331-356.

when he states that he does not regard it as permissible today for Muslim armies to institute new types of ᶜamal that are contrary to the ᶜamal of the Companions who had instituted provincial ᶜamal initially. One is reminded in connection with this of the reports mentioned earlier that the ᶜAbbāsid caliph al-Manṣūr had desired to establish a uniform ᶜamal in his empire and is said to have wanted to use the Muwaṭṭa' as his standard, although Mālik is reported to have sought to discourage him from doing so.[1]

The history of the Egyptian judiciary toward the end of al-Laith's life, who died in 175/791 four years before Mālik, and for at least some time thereafter makes it appear that the ᶜAbbāsids may have wanted to adopt a policy of instituting ᶜamal according to the Ḥanafī school in Egypt at least. In early 165/781, for example, the ᶜAbbāsid ruler al-Mahdī sent the Iraqi Ḥanafī 'Ismāᶜīl ibn al-Yasaᶜ al-Kindī to Egypt and installed him as qāḍī; he is said to have been the first Ḥanafī qāḍī to preside in Egypt. 'Ismāᶜīl ibn al-Yasaᶜ attempted to make numerous changes in the Egyptian ᶜamal--especially the abolition of waqf properties ['ibṭāl al-'aḥbās]--which earned him the hatred of the Egyptian people. Al-Laith, who regarded Ibn al-Yasaᶜ as an honest man in money matters, accused him, nevertheless, of making innovations contrary to the sunnah of the Prophet. It was at

[1]See above, pp. 99-102, and below, pp. 392-394.

al-Laith's urgent request to the ᶜAbbāsid caliph that Ibn al-Yasaᶜ was removed from office in 167/783. It should be noted, however, that the famous Egyptian muḥaddith Saᶜīd ibn 'Abī Maryam[1] regarded 'Ismāᶜīl ibn al-Yasaᶜ to have been one of the best qāḍī's Egypt had had, despite the fact that Ibn al-Yasaᶜ was a Ḥanafī.[2]

During the next thirty-four years from the time of the appointment of 'Ismāᶜīl ibn al-Yasaᶜ in 165/781 until the removal of the Iraqi qāḍī al-Faḍl ibn Ghānim al-Khuzāᶜī in 199/814, six Iraqi appointees presided over the Egyptian judiciary for a total of approximately twenty-six years. Only three of them, however, are explicitly designated as Ḥanafīs: 'Ismāᶜīl ibn al-Yasaᶜ, Muḥammad ibn Masrūq al-Kindī (presided from 177/793-184/800), and Hāshim ibn 'Abī Bakr al-Bakrī (presided from 194/809-196/811). Each of these three was highly reputable; the first two, however, became so unpopular that they had to be removed; the third died while in office. No indication of school affiliation is given for two of these Iraqis, who were, by the way, considerably less reputable: ᶜAbd-ar-Raḥmān ibn ᶜAbd-Allāh al-ᶜUmarī (presided from 185/801-194/809) and al-Faḍl ibn Ghānim

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[1]See above, p. 87, n. 4.

[2]Muḥammad ibn Yūsuf AL-KINDĪ (283-360/896-914), Kitāb al-Wulāh wa Kitāb al-Quḍāh, ed. Rhuvon Guest, The Governors and Judges of Egypt: Kitāb el 'Umarā' (el Wulāh) wa Kitāb el Quḍāh; together with an Appendix Derived Mostly from Rafᶜ el Iṣr by Ibn Ḥajar, E.J.W. Gibb Memorial Series, no. 19 (Leyden: E.J. Brill, 1912), pp. 371-372.

al-Khuzāᶜī (presided from 198/813-199/814).[1]

One of these Iraqi appointees, however, was an expertly trained Mālikī: 'Abū 'ṭ-Ṭāhir ᶜAbd-al-Malik ibn Muḥammad al-Ḫazmī (presided from 170/786-174/790). He was the first Iraqi appointment after the removal of 'Ismāᶜīl ibn al-Yasaᶜ three years earlier in 167/783. Al-Laith and the Egyptian masses spoke highly of him, and it should be pointed out that, in addition to his extensive knowledge of the Madīnan school, al-Ḫazmī was a conscientious qāḍī. He personally inspected waqf properties, for example, three times a month and would have the caretakers whipped if they did not keep their properties clean or manage them properly. He asked to be removed from the judiciary in 174/790 and was excused. Thus, al-Ḫazmī was the qāḍī of Egypt during four years and four months of al-Laith's last five years. It may not be coincidental that in 177/793, just two years after al-Laith's death, the stern but just Ḥanafī qāḍī, Muḥammad ibn Masrūq al-Kindī was instituted as the qāḍī of Egypt.[2]

As al-Laith's letter continues, he justifies his having differed with Madīnan ᶜamal on some points by reminding Mālik that Rabīᶜah and az-Zuhrī--whom he describes as the most prominent ᶜulamā' of Madīnah during their times--were known to have disagreed with Madīnan ᶜamal [mā qad maḍā]. He points out that Rabīᶜah began to disagree with some parts

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[1]Al-Kindī, pp. 371-424. [2]Ibid.

of ᶜamal so frequently that he aroused the disapproval of other prominent Madīnan fuqahā' and of Mālik also, who then decided to sit in Rabīᶜah's circle no longer. Nevertheless, al-Laith contends, Rabīᶜah was an excellent faqīh from whom much benefit could be derived. Al-Laith then points out that az-Zuhrī, despite the excellence of his knowledge and his personal judgment [ra'y], used to change his opinions in various matters. One of al-Laith's associates in fact is said to have written to az-Zuhrī about a single matter on various occasions and to have received three different and contradictory answers.[1]

Al-Laith reminds Mālik that in the past al-Laith had disagreed with certain types of well-established Madīnan ᶜamal such as the Madīnan practice of joining together the maghrib [sunset] and night [ᶜishā'] prayers on nights when it is rainy or muddy and such as the Madīnan practice of making judgments in money matters on the basis of the oath of the plaintiff supported by the testimony of a single witness. These practices, al-Laith continues, had never been part of the ᶜamal of Syria, Ḥimṣ, Iraq, or Egypt. The Companions did not institute them there, nor did the first four caliphs write to them, directing them to do so.[2]

Finally, before closing the letter al-Laith objects to four of Mālik's legal opinions, some of which, as he men-

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[1]Ibn Qayyim, (Saᶜādah), 3:96. [2]Ibid., 3:96-98.

tions, he had written to Mālik about earlier. Not having received an answer from Mālik, however, al-Laith says that he stopped writing to Mālik about such matters and followed his own opinion in them instead. Al-Laith objects, for example, that Mālik has transmitted a ḥadīth which states that the Prophet gave extra shares of booty to a Companion of his who had fought on horseback and had mounted Companions on horses which he owned for only one of these horses. All others [an-nās kulluhum], al-Laith contends, transmit the ḥadīth that the Prophet gave this Companion extra shares for two of these horses but not for any more than two. The entire 'ummah, al-Laith states, follow this other ḥadīth--the people of Syria, Egypt, Iraq, and North Africa--and al-Laith says: "Even if you heard this ḥadīth from a person whom you regard highly, it is not fitting that you hold an opinion contrary to the entire 'ummah."[1] As 'Abū Zahrah points out, however, 'Abū Ḥanīfah held an opinion similar to Mālik on this question, and 'Abū Yūsuf, who supports 'Abū Ḥanīfah's position, claims in Siyar al-'Awzā^{c}ī that this ḥadīth, which al-'Awzā^{c}ī mentions and to which al-Laith is referring, is an isolated ḥadīth and, hence, not authoritative.[2]

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[1]Ibn Qayyim, (Sa^{c}ādah), 3:98-99.

[2]'Abū Zahrah, Mālik, pp. 132-133, note 2; 'Abū Zahrah discusses here the legal background of each of al-Laith's four contentions against Mālik.

Al-Laith adds in closing that Mālik has frequently passed over matters like his passing over this ḥadīth. Nevertheless, al-Laith concludes, he has the highest estimation of Mālik and desires that Mālik continue to prosper and have long life so that the people may continue to benefit from him.[1]

'Abū Yūsuf's Critique of the ᶜAmal of the Ḥijāz

Although directed against the Syrian faqīh al-'Awzāᶜī, 'Abū Yūsuf's polemical work Siyar al-'Awzāᶜī contains references to the people of the Ḥijāz and their notions of ᶜamal, which 'Abū Yūsuf likens to al-'Awzāᶜī's view of ᶜamal and to which he applies the same criticism. Since 'Abū Yūsuf's argumentation in Siyar al-'Awzāᶜī is directed against al-'Awzāᶜī, however, it is possible that his references to the ᶜamal of the Ḥijāz do not reflect 'Abū Yūsuf's critique of Madīnan ᶜamal comprehensively, which one should bear in mind when comparing 'Abū Yūsuf's critique to ash-Shāfiᶜī's, which was written against the Madīnan school specifically. Siyar al-'Awzāᶜī is also a relatively short work, and, as its title indicates, it is limited to only a small range of topics, namely, those that pertain to the laws of war and the implementation of Islamic law outside the realm of the Islamic state.

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[1]Ibn Qayyim, (Saᶜādah), 3:99-100.

'Abū Yūsuf's contention against the ᶜamal of the Ḥijāz and Syria is that its source is uncertain and its continuity cannot be verified. He states, for example:

> The people of the Ḥijāz hand down a given judgment, and when it is asked of them from whom [they learned of this], they answer, "This has come down to us as sunnah" ["bi-hādhā jarat as-sunnah"]. But it may be that it is just a ruling that was handed down by the overseer of the market place or that it is the judgment of some provincial governor.[1]

Or again, after al-'Awzāᶜī's protagonist supports his position by saying that the people of knowledge follow the matter and it has been the ᶜamal of the caliphs [al-'a'immah], 'Abū Yūsuf replies:

> As for [al-'Awzāᶜī's] statement, "This has been the ᶜamal of the caliphs [al-'a'immah] and what the people of knowledge have held as valid," it is like what the people of the Ḥijāz say: "This has been well-established in the sunnah" ["wa bi-dhālika maḍat as-sunnah"]. But that is unacceptable [to us], nor can it be accepted from those who have no knowledge [of its source]. Who is the caliph ['imām] who made this his ᶜamal? And who is the ᶜālim who held to this opinion? so that we may judge for ourselves whether or not he is a worthy source and to be trusted in matters of knowledge.[2]

'Abū Yūsuf mentions elsewhere that, in order to be valid, such types of ᶜamal must be verified by reference to authentic textual sources of law. Regarding one matter, for example, in which al-'Awzāᶜī has based his reasoning on ᶜamal, 'Abū Yūsuf denies that to be a valid argument and asks, "Does [al-'Awzāᶜī] possess any report ['athar] with a full 'isnād that has been transmitted by reliable transmitters [ath-thiqāt] that the Messenger of God [did this]?"[3] In another in-

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[1] 'Abū Yūsuf, p. 11. [2] Ibid., pp. 41-42.

[3] Ibid., pp. 22-23.

stance, 'Abū Yūsuf objects to al-'Awzā^{c}ī's argumentation that "the people have continued to follow" a certain practice ["lam yazal an-nās ^{c}alā hādhā"]--an expression which has counterparts in the Muwaṭṭa' and Mudawwanah.[1] 'Abū Yūsuf contends that most of the things the people have continued to be following are either impermissible or improper, and he adds:

> In matters like this it is only the sunnah that is to be followed [as it has come down] from the Messenger of God . . . from those of our predecessors who were his Companions, and from the fuqahā'.[2]

I have found no instances in Siyar al-'Awzā^{c}ī in which 'Abū Yūsuf contends that Madīnan claims to have 'ijmā^{c} on precepts to which they subscribe are inaccurate. As will be seen, one of the distinctive parts of ash-Shāfi^{c}ī's argument against the Madīnan school is that he regards their claims to local 'ijmā^{c} to be invalid. Similarly, ash-Shaibānī contends that the people of Madīnah have sometimes altered the legal opinions to which they had adhered.[3] 'Abū

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[1]See below, pp. 583-599. [2]'Abū Yūsuf, pp. 75-76.

[3]Muḥammad ibn al-Ḥasan ASH-SHAIBĀNĪ, Kitāb al-Ḥujjah ^{c}alā 'Ahl al-Madīnah, ed. Mahdī Ḥasan al-Gilānī al-Qādirī under the supervision of 'Abū 'l-Wafā' al-'Afghānī, ? vols. (Haidarabad: Al-Maṭba^{c}ah ash-Sharqīyah, 1385/1965), 1:58-65.

I did not have the opportunity to study ash-Shaibānī's arguments against the Madīnans because I was only able to obtain the first volume of this several-volumed work. The first volume treats only the rituals of ablutions and prayer and some of the precepts of zakāh. It might also be pointed out that Brunschvig does not treat the anti-Madīnan polemics of either 'Abū Yūsuf or ash-Shaibānī; see Brunschvig, p. 387, note 1.

Nevertheless, it is remarkable how similar ash-Shai-

Yūsuf is somewhat similar to ash-Shāfi^{c}ī in his emphasis--witnessed in the citations above--that ^{c}amal be verified by reference to authentic legal texts; it is clear from these citations, which refer to ḥadīth, the āthār of the Companions, and the opinions of prominent fuqahā', as well as earlier citations from 'Abū Yūsuf that, unlike ash-Shāfi^{c}ī, 'Abū Yūsuf did not regard isolated ḥadīth to be a valid criterion by which to contradict ^{c}amal, and 'Abū Yūsuf accepts textual sources--such as āthār and the opinions of fuqahā'--which ash-Shāfi^{c}ī would not regard to be valid.[1] This emphasis on textual reports [āthār] appears to be even stronger in ash-Shaibānī's critique of Madīnan ^{c}amal, which seems in general to be very close in spirit and method of argument to ash-Shāfi^{c}ī's later polemical writings.[2]

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bānī's argumentation in this work seems to ash-Shāfi^{c}ī's in "Ikhtilāf Mālik". They sound so much alike, in fact, that one would have difficulty distinguishing between texts taken from ash-Shaibānī's Ḥujjah or ash-Shāfi^{c}ī's work. Since ash-Shāfi^{c}ī studied with ash-Shaibānī in Kūfah, it is likely that this similarity reflects ash-Shaibānī's influence upon him. Ash-Shaibānī, for example, cites numerous ḥadīth and āthār in his Ḥujjah to support his position and accuses the Madīnans, in a manner similar to ash-Shāfi^{c}ī's, of not having followed the reports they have transmitted or of adhering to them in some cases and not in others. As Ansari has pointed out, ash-Shaibānī criticizes the Madīnans frequently in his Ḥujjah for arbitrarily using ra'y to contradict textual sources, instead of basing their doctrines on texts to which they subscribe. See Ansari, "Juristic Terminology," p. 290.

[1]See above, pp. 170-179.

[2]See Ansari, "Juristic Terminology," p. 290, and p. 333 above, note 3.

I will discuss in greater detail later the means by which Mālik seems to indicate the validity and continuity of Madīnan ᶜamal in the Muwaṭṭa'. He frequently does so by referring to ḥadīth, āthār, and the legal opinions of prominent Madīnan fuqahā' which are in conformity with contemporary ᶜamal. It is this use of textual reports in the Muwaṭṭa' as ancillaries of ᶜamal and well-established sunnah that makes that work, as Goldziher has suggested, more a compendium of sunnah than a compilation of ḥadīth.[1] Sometimes, however, Mālik sets forth Madīnan ᶜamal with no reference to supporting textual sources of law. Often in such instances he will make general references to the agreement of the people of learning of Madīnah on such matters, that they have never been known to have objected to them, or that he found them during his lifetime holding to the validity of them--which are just the sort of general references to which 'Abū Yūsuf has objected in the preceding citations. Such types of ᶜamal often pertain to the category of ᶜumūm al-balwā,[2] that is, they are very common and sometimes very old parts of Madīnan ᶜamal, and Mālik's assumption seems to be that it is highly improbable that the Prophet should have prohibited them or that they should have been instituted erroneously at a later time without some of the Madīnan

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[1]Goldziher, Studien, 2:213-214; see above, pp. 304-305.

[2]See above, pp. 184-188, and below, pp. 481-484.

ᶜulamā' during the preceding three generations having made their objections to them known. Mālik also supports the validity of certain parts of Madīnan ᶜamal by pointing out analogical relationships between them and other parts of Madīnan ᶜamal or by other types of legal reasoning, such as his reasoning on the basis of maṣlaḥah in supporting the precept of qasāmah.[1]

In light of the preceding discussion about al-Laith's support of local practices and the possibility that there had been, during al-Laith's lifetime and for at least some time thereafter, an ᶜAbbāsid policy to institute Ḥanafī ᶜamal in place of Egyptian local ᶜamal, I would like to present, finally, the hypothesis that the polemical writings of 'Abū Yūsuf and ash-Shaibānī may have been part of such a policy. 'Abū Yūsuf, who died in 182/798 about seven years after al-Laith and three years after Mālik, and ash-Shaibānī worked closely with the ᶜAbbāsid caliphs. Both were ᶜAbbāsid qāḍī's, 'Abū Yūsuf having been instituted as the first qāḍī al-quḍāh [chief qāḍī] sometime after 169/785.[2] Thus, Siyar al-'Awzāᶜī might represent an attempt to remove the authority of Syrian provincial ᶜamal by calling its continuity into question as a preparatory step to instituting Ḥanafī

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[1]See below, pp. 382-409, 713-723.

[2]See Sezgin, 1:419, 421, and see above, p. 53, n. 3; p. 54, n. 2.

ᶜamal in Syria through the ᶜAbbāsid-controlled judiciary system. Although the immediate purpose of Siyar al-'Awzāᶜī, when interpreted from this point of view, would have been to remove the authority of Syrian ᶜamal, it was also part of the purpose, of the work, as indicated by the citations I have given, to call Madīnan ᶜamal into question, which 'Abū Yūsuf refers to, perhaps cautiously, as the ᶜamal of the Ḥijāz. Although it is doubtful that the ᶜAbbāsids during Mālik's lifetime and for some time thereafter would have entertained hopes of replacing Madīnan ᶜamal with Ḥanafī ᶜamal, such attacks on Madīnan ᶜamal--which become direct and explicit in the writings of ash-Shaibānī--might weaken the authority of Madīnan ᶜamal abroad, especially in regions like Egypt, and thereby facilitate the institution of a uniform Ḥanafī ᶜamal in those provinces. This hypothesis, of course, requires further research; it would provide, however, an interesting perspective on the development of polemical writings pertaining to Islamic law.

Ash-Shaibānī's Polemics Against the Madīnans

I have already mentioned how similar ash-Shaibānī's arguments against the Madīnans are to those of ash-Shāfiᶜī. He places great emphasis upon textual sources of law and contends that the Madīnans have been arbitrary by giving priority to ra'y over textual reports [āthār] and by not basing their opinions directly on the textual sources to which they

subscribe. Like 'Abū Yūsuf, ash-Shaibānī also questions the continuity of Madīnan ᶜamal, contending that in some cases the Madīnans hold opinions contrary to those which Madīnans had held in the past.[1] In this section I would like to present ash-Shaibānī's arguments in more detail, these arguments having been taken from ash-Shāfiᶜī's work "Ar-Radd ᶜalā Muḥammad ibn al-Ḥasan". One of the interesting features of this work is that it seems to have been written earlier in ash-Shāfiᶜī's career--certainly prior to "Ikhtilāf Mālik"--and ash-Shāfiᶜī sometimes defends the Madīnans and Mālik against ash-Shaibānī.[2] It is also noteworthy that ash-Shāfiᶜī on two occasions accuses ash-Shaibānī of having misrepresented Mālik's opinions or of having attributed to Mālik things which he had not said.[3]

In this work ash-Shaibānī claims, as he has elsewhere, that the Madīnans have been arbitrary by virtue of their holding opinions for which they have no support in the textual sources of law. He says, for example:

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[1]See above, pp. 333-334, and p. 334, note 3.

[2]See, for example, ash-Shāfiᶜī, "Radd," p. 297 (10). Within the body of the chapter, ash-Shāfiᶜī responds to a question that ash-Shaibānī asks by presenting the Madīnan point of view. At the close of the section, however, ash-Shāfiᶜī presents a very contrary point of view, which reflects the theoretical position of the later Shāfiᶜī. Thus, it appears that this closing statement is an editorial addition, as it were, of the later Shāfiᶜī upon this earlier work.

[3]Ibid., pp. 280 (7); 285 (2).

> And how can it be permissible for the people of Madīnah to be arbitrary [yatabakkamū] in this matter and select these four stipulations from [other possible] stipulations. How do you think you would be able to refute the people of Baṣrah, were they to say, "We want to adhere to two different stipulations;" or the people of Syria, were they to say, "We want three different stipulations."? Hence, it is proper that people do what is right [yunṣifa] and not be arbitrary . . . . I will not follow any opinion unless the people of Madīnah bring me a text ['athar] supporting what they say that I can follow it. But they have no text in this matter . . . .[1]

It is worthy of note that ash-Shaibānī in this argument has not conceded to the ᶜamal of Madīnah, upon which they base their four stipulations, any priority over the ᶜamal of other regions, namely, Baṣrah and the province of Syria. Thus, he would not subscribe to the arguments of Mālik and al-Laith, as reflected in their letters, that the status of Madīnan knowledge is qualitatively better than that of other centers.

Ash-Shaibānī again calls the continuity of Madīnan ᶜamal into question and doubts that its original source can be verified. To follow ᶜamal on the assumption that it goes back to an authoritative source is, he says, at best conjectural [ẓann], whereas to follow a text is certain [yaqīn].[2] Ash-Shaibānī states that the prominent Madīnan faqīh Yaḥyā ibn Saᶜīd,[3] one of Mālik's primary teachers, had supported the authority of a matter by saying that it was "min al-'amr al-qadīm" [one of the long-established precepts].

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[1]Ash-Shāfiᶜī, "Radd," p. 288 (1). [2]Ibid., p. 297 (10).

[3]For data and other information, see above, p. 63, n. 2.

Ash-Shaibānī remarks to ash-Shāfi^{c}ī:

> "Al-Qadīm" [long-established] could be from someone who is worthy of being imitated and whose opinion is binding just as it could be from governors [al-wulāh] who are not worthy of being imitated and whose opinions are not binding. So from which of these two is it?[1]

Elsewhere ash-Shaibānī discusses a part of Madīnan ^{c}amal pertaining to the indemnities [diyāt] of Jews, Christians, and Magians--a matter which Mālik refers to in the Muwaṭṭa' as AN [al-'amr ^{c}indanā], indicating thereby, according to my analysis, that it was a matter in which there had been significant differences of opinion within Madīnah.[2] Az-Zuhrī, according to ash-Shaibānī, had opposed this opinion and had transmitted ḥadīth to the contrary, had held that it was contrary to the practices of 'Abū Bakr, ^{c}Umar, and ^{c}Uthmān, and had argued that these indemnities had been first instituted by Mu^{c}āwiyah.[3] Ash-Shaibānī states while discussing another matter that Mālik had said one day that they had not held to that practice until a certain ^{c}Abd-al-^{c}Azīz ibn al-Muṭṭalib handed down that judgment. Thus, the ^{c}amal

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[1]Ash-Shāfi^{c}ī, "Radd," p. 297 (10).

[2]Muwaṭṭa', 2:864.

[3]Ash-Shāfi^{c}ī, "Radd," p. 291 (7). The authority Mālik cites for this ruling in the Muwaṭṭa' is, however, ^{c}Umar ibn ^{c}Abd-al-^{c}Azīz, who, according to the "Mawwāzīyah", was Mālik's chief authority in the matter. Certain parts of the matter are also supported by Yaḥyā ibn Sa^{c}īd and Sulaimān ibn Yasār. No mention is made of Mu^{c}āwiyah, although Mālik does regard him elsewhere in the Muwaṭṭa' to have been trustworthy and authoritative. There is also no mention of az-Zuhrī's opposition, although, as pointed out, the matter is an AN. Al-Bājī supports the AN by analogy with precepts pertaining to the indemnities of women. Al-Bājī, 7:97-98.

of Madīnah in some cases, ash-Shaibānī concludes, goes back to the ᶜamal of one of the governors [ᶜāmil] of their city.[1]

Ash-Shāfiᶜī's "Ikhtilāf Mālik"

'Abū Zahrah identifies two main points in ash-Shāfiᶜī's contentions against Mālik in "Ikhtilāf Mālik". First of all, ash-Shāfiᶜī denies the validity of Madīnan claims to have 'ijmāᶜ on several matters for which he believes they have laid claim to it; thus, 'Abū Zahrah points out, ash-Shāfiᶜī attempts to remove that claim as an authoritative basis of argumentation.[2] At one point, for example, just before indicating that the Mālikīs object to following isolated ḥadīth [khabar al-infirād], ash-Shāfiᶜī contends that such claims of consensus are the way [ṭarīq] of those who refuse to follow ḥadīth altogether ["'abṭalū 'l-'aḥādīth kullahā"] but for the fact that they lay claim to the consensus of all ['ijmāᶜ an-nās], while the Madīnans lay claim to the 'ijmāᶜ of their own city.[3] Secondly, ash-Shāfiᶜī champions the

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[1]Ash-Shāfiᶜī, "Radd," p. 302 (26). The ruling pertains to qiṣāṣ [lawful retaliation] in the case of intentionally cutting off another's finger. I found no discussion of the ruling in the Muwaṭṭa', although Mālik cites an AMN that is analogical and mentions the ruling, in passing, further down the page in the context of another discussion (Muwaṭṭa', 2: 875). Al-Bājī indicates that this ruling is in keeping with the general provision of the Qur'ānic verse (Qur'an, 5:45), which supports the AMN; al-Bājī, 7:128-129.

[2]'Abū Zahrah, Mālik, p. 339; cf. Brunschvig, pp. 391-394.

[3]Ash-Shāfiᶜī, "Ikhtilāf Mālik," pp. 260-261.

authority of isolated ḥadīth and argues that 'ijmā^c based on deductions from other sources of law [istinbāṭ] and on other types of ijtihād is not sufficiently strong to reject contrary isolated ḥadīth.[1]

As Brunschvig observes, ash-Shāfi^cī contends in the strongest terms that the Mālikīs are arbitrary; he denies that there is any method to their reasoning; and he even asserts at several points that they are incompetent and not qualified to give out legal opinions.[2] Not only does he call Madīnan 'ijmā^c into question, but he also contends that Madīnan ^camal is very dubious, at one point claiming that it, like Madīnan 'ijmā^c, is just a word that Madīnans say ['aqāwīlukum].[3] He accuses them of being the most culpable of all people both in failing to follow Prophetic ḥadīth and in failing to follow their own Madīnan traditions consistently.[4] In fact, as Brunschvig observes, ash-Shāfi^cī contends at times that Mālik has taken some of his opinions not from Madīnan ^camal at all but rather from 'Abū Ḥanīfah.[5]

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[1]'Abū Zahrah, Mālik, p. 339; cf. Brunschvig, pp. 388, 391.

[2]See ash-Shāfi^cī, "Ikhtilāf Mālik," pp. 201, 202-203, 206, 208, 215-216, 233, 258, 260, 265.

[3]See Ibid., p. 259; cf. pp. 206, 207, 226.

[4]See Ibid., pp. 202-203, 206, 208, 258-259, 265.

[5]See Ibid., pp. 223, 230-231, 267. For all the preceding references to Brunschvig, see Idem, pp. 390, 392, 389, in that order.

Noting that ash-Shāfi^{c}ī argues throughout this work on the basis of ḥadīth which Mālik himself has transmitted, Brunschvig holds that ash-Shāfi^{c}ī places Mālik the muḥaddith, the authenticity of whose transmission he does not doubt, in opposition to Mālik the faqīh, whom he regards as questionable.[1]

Ash-Shāfi^{c}ī on Madīnan 'ijmā^{c}

Ash-Shāfi^{c}ī contends that Madīnan 'ijmā^{c} may only be claimed for those matters regarding which there has been total consensus in Madīnah over the generations.[2] He asserts, furthermore, that there is no 'ijmā^{c} in Madīnah except regarding such matters for which there is 'ijmā^{c} in all regions and that there is no matter in which there have been differences of opinion in Madīnah but that there have been differences of opinion on that matter in all regions;[3] as Brunschvig points out, ash-Shāfi^{c}ī does not produce any evidence to substantiate this claim.[4] It is an assertion, nevertheless, that deprives Madīnan 'ijmā^{c} of any distinctive value as compared with the 'ijmā^{c} of the 'ummah.

Ash-Shāfi^{c}ī's definition of 'ijmā^{c} is very important,

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[1]Brunschvig, p. 388.

[2]Ibid., p. 393; ash-Shāfi^{c}ī, "Ikhtilāf Mālik," pp. 202-203, 267.

[3]Ash-Shāfi^{c}ī, "Ikhtilāf Mālik," pp. 202-203, 253; Brunschvig, pp. 393-394.

[4]Brunschvig, pp. 393-394.

since, as I have suggested earlier, Mālik's concept of ijtimā^c as reflected in the usage AMN [al-'amr al-mujtama^c ^calaihi ^cindanā] may not refer to total consensus but rather to a majority consensus, whereas more explicit terms--like A-XN [al-'amr al-ladhī lā 'khtilāf fīhi ^cindanā], AMN-X [al-'amr al-mujtama^c ^calaihi ^cindanā wa 'l-ladhī lā 'khtilāf fīhi], and S-XN [as-sunnah al-latī lā 'khtilāf fīhā ^cindanā]-- which deny the existence of any differences of opinion, may refer to the sort of total consensus that ash-Shāfi^cī has in mind.[1] When denying the validity of Madīnan 'ijmā^c, it is the terms AN and AMN that ash-Shāfi^cī usually refers to, stating that there are generally differences of opinion in Madīnah regarding both of them.[2] Ash-Shāfi^cī indicates, regarding AN, for example, that if it is a synonym for Madīnan 'ijmā^c it has been used erroneously, because there are differences of opinion in it; yet, he continues, "if the word is meaningless why have you burdened yourselves with it?"[3] Thus, if the term does not stand for total consensus, ash-Shāfi^cī sees no meaningful middle ground for it. At one point, ash-Shāfi^cī's Mālikī protagonist seems to define 'ijmā^c as the consensus of a majority:

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[1]See above, pp. 425-426.

[2]See ash-Shāfi^cī, Ar-Risālah, pp. 531-535; idem, "Ikhtilāf Mālik," pp. 267; cf. pp. 259, 235; Brunschvig, pp. 391-393.

[3]Ash-Shāfi^cī, "Ikhtilāf Mālik," (Būlāq ed.), p. 249, cited by Brunschvig, p. 391.

> . . . when I find a generation [qarn] of the people of knowledge of a city where there is knowledge [bi-balad ᶜilm] holding an opinion upon which most of them are agreed ["yakūnu 'aktharuhum muttafiqīn ᶜalaihi"], I call that 'ijmāᶜ, whether those who were before agreed to it or disagreed. For in so far as those who were before them are concerned, the majority of [these contemporaries who are reaching agreement] would not agree on a matter out of ignorance of what was held before them. They would never set aside what had been held before them except on the grounds that it had been abrogated [and that had not been known to those who were before them] or unless they had come to know of something that was better-established than it, even though they may not mention what it is.[1]

Another of ash-Shāfiᶜī's contentions is that he does not know who the constituents of Madīnan 'ijmāᶜ are meant to be. Such a contention--it might be pointed out--would imply that not all Madīnans and probably not all Madīnan fuqahā' were regarded as constituting that 'ijmāᶜ, which, as pointed out earlier, would be consistent with Mālik's attitude toward the ᶜulamā'.[2] Ash-Shāfiᶜī states, for example:

> Thus, you have said that they reached 'ijmāᶜ but you have not transmitted the opinion you are holding from a single 'imām. I do not know who constitutes the "people" [an-nās] for you.[3]

Later he says:

> So who is it that has reached 'ijmāᶜ on setting aside the sunnah and following something contrary to ᶜUmar? Would that I knew ["fa-yā laita shiᶜrī"] just who these "makers of consensus" [hā'ulā' al-mujtamiᶜūn] were . . . .[4]

Although it appears from analysis of Mālik's terminol-

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[1]Ash-Shāfiᶜī, "Ikhtilāf Mālik," p. 264.

[2]See above, pp. 72-76.

[3]Ash-Shāfiᶜī, "Ikhtilāf Mālik," pp. 202-203.

[4]Ibid., p. 232.

ogy that he drew a distinction between Madīnan ᶜamal that did not have 'ijmāᶜ and Madīnan ᶜamal that did, it appears from ash-Shāfiᶜī's arguments in "Ikhtilāf Mālik" that at least some Mālikīs had been claiming that there was complete consensus in Madīnah on the precepts to which the Madīnans subscribed. At one point, for example, he states, after having indicated that there had been differences of opinion in Madīnah on the matter in question, "And now where is your claim that knowledge in Madīnah is like a legacy in which they do not disagree?"[1] Later he refers to a claim of his opponents that the fuqahā' of Madīnah never disagree; in fact, ash-Shāfiᶜī has argued that the fuqahā' of Madīnah did indeed disagree on some matters and that the rulers of the city [al-'umarā'] would follow the opinions of some of them instead of others, thus making the opinions they selected parts of Madīnan ᶜamal.[2]

There are occasionally discrepancies between what ash-Shāfiᶜī's opponent attributes to Mālik in "Ikhtilāf Mālik" and what is to be found in Yaḥyā ibn Yaḥyā's transmission of the Muwaṭṭa'. In one example that pertains to Madīnan consensus, for instance, ash-Shāfiᶜī's opponent says,

> We hold that the people [an-nās] have reached ijtimāᶜ that there are eleven verses in the Qur'ān after reading which one should prostrate oneself and that none of them is contained in the Mufaṣṣal.[3]

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[1]Ash-Shāfiᶜī, "Ikhtilāf Mālik," p. 235. [2]Ibid., p. 259.

[3]Ibid., p. 202. The Mufaṣṣal is that part of the

This is an important example in ash-Shāfi^{c}ī's argument, for it is in the context of it that he tells his opponent that they must not claim 'ijmā^{c} except in matters regarding which there have been no differences of opinion, and it is also in its context that ash-Shāfi^{c}ī makes the comment, referred to just above, that he does not know whom they mean by the "people". In the Muwaṭṭa', however, Mālik gives no explicit indication of 'ijmā^{c}; on the contrary, the precept is an AN. Furthermore, the wording of the precept is significantly different. Mālik says:

> The AN [al-'amr ^{c}indanā] is that those verses after reading which one must prostrate oneself [^{c}azā'im sujūd al-qur'ān] are eleven, and none of them is contained in the Mufaṣṣal.[1]

The wording "^{c}azā'im sujūd al-qur'ān" leaves open the possibility that there are other verses in the Qur'ān after reading which one may prostrate oneself, but prostrating oneself after reading them would be a voluntary matter. According to this interpretation, there is no contradiction between Mālik's AN precept and the reports of actions in the chapter that report the Prophet and certain of his Companions as having prostrated themselves after reading verses in the Mufaṣṣal.[2]

Qur'ān that begins with the 49th sūrah, "Al-Ḥujurāt," and goes to the end. It is so named because the sūrah's it contains tend to be short; thus, there are many divisions [fuṣūl] between its chapters. There are several definitions regarding which sūrah the Mufaṣṣal begins with. See Lane, 6:2407-2408, s.v. "FṢL".

[1]Muwaṭṭa', 1:207. [2]See above, pp. 194-195.

Ash-Shāfi^{c}ī on isolated texts and reports of actions and rulings

As mentioned earlier, one of the fundamentals of ash-Shāfi^{c}ī's legal reasoning is that he presumes legal texts to be generally applicable and not to have been abrogated unless there is other textual proof that they are otherwise.[1] Thus, in "Ikhtilāf Mālik," ash-Shāfi^{c}ī regards all legal texts to be normative--whether they report statements, isolated actions, or individual rulings that were handed down. He does not seem to draw the distinction between explicit directives, on the one hand, and reports of actions and individual rulings, on the other, which seems to be an important part of Mālik's legal reasoning.[2] In fact, according to ash-Shāṭibī--and I believe there is ample evidence to support this in Mālik's legal reasoning--one of the chief functions of ^{c}amal, itself a normative concept, is to distinguish between those legal texts which report normative matters and those which report unusual or purely personal types of behavior.[3] Thus, it is noteworthy that most of ash-Shāfi^{c}ī's contentions in "Ikhtilāf Mālik" pertain to reports of actions; some of them pertain to individual rulings; and a few to statements.

Ash-Shāfi^{c}ī regards Mālik to have been arbitrary, for example, because he transmits a ḥadīth that reports that

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[1]See above, pp. 140-141. [2]See above, pp. 188-195.

[3]See below, pp. 436-448.

the Prophet performed a certain action while praying--namely, raising the hands before bowing and prostrating himself--and that Ibn ᶜUmar also performed that action while praying. Mālik, however, does not regard this action to be a required part of the prayer or to constitute ᶜamal. Ash-Shāfiᶜī asks the Mālikī proponent how one can regard it to be permissible to adhere to isolated statements [qawl] of Ibn ᶜUmar, on the one hand--as Mālik often does--and not regard his action to be authoritative in this case when supported by the action of the Prophet, which ash-Shāfiᶜī regards to be the Prophet's sunnah. Thus, ash-Shāfiᶜī does not recognize any qualitative difference between explicit directives and reports of actions, although, according to Mālikī legal theory, reports of actions are ambiguous by nature and are not sufficient evidence in themselves to establish that a matter is obligatory or normative for others.[1]

In a subsequent example, ash-Shāfiᶜī contends against the Mālikīs for making directives [qawl] of ᶜUmar ibn al-Khaṭṭāb the basis of their ᶜamal, while not imitating an action which they have reported ᶜUmar to have done.[2] In another example, after objecting to Mālik's opinion that a certain individual legal ruling that ᶜUmar handed down is not norma-

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[1]See above, pp.190 -191; ash-Shāfiᶜī, "Ikhtilāf Mālik," p. 201; see Muwaṭṭa', 1:75-77. It might be noted that several ḥadīth in this chapter which describe the Prophet's prayer make no mention of his having performed this action.

[2]Ash-Shāfiᶜī, "Ikhtilāf Mālik," p. 202.

tive ["laisa ᶜalaihi 'l-ᶜamal"], ash-Shāfiᶜī argues with rigorous all-or-nothing logic that if ᶜUmar is authoritative in one instance, he must be so in others ["wa huwa 'idhā kāna marratan ḥujjah, kāna ka-dhālika 'ukhrā"].[1] Ash-Shāfiᶜī does not concede that there may have been something about the circumstances of this individual ruling that made it unusual--perhaps even in ᶜUmar's eyes--and, hence, not a normative standard for all future judgments.

It is because of these discrepancies between Madīnan ᶜamal and reports of actions, individual rulings, and so forth which Mālik does not regard to be normative that ash-Shāfiᶜī contends that the Madīnans are the most culpable of people in failing to follow the Prophet and their own Madīnan traditions. It is also on this basis that he makes the charge that the Mālikīs are incompetent and should not be allowed to give fatwā's. For example, after noting that the Mālikīs follow directives of Ibn ᶜUmar but sometimes do not adhere to actions of his even when they conform to actions the Prophet is reported to have done, ash-Shāfiᶜī contends:

> It ought not be permitted to one who is ignorant of things like this to be able to speak about matters of knowledge that are even more technical ['adaqq].[2]

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[1]Ash-Shāfiᶜī, "Ikhtilāf Mālik," p. 233.

[2]Ibid., 201.

Some of ash-Shāfi^{c}ī's harshest charges against the Mālikīs come, however, when the Mālikī proponent of "Ikhtilāf Mālik" evaluates certain isolated actions that the Prophet or 'Abū Bakr and ^{c}Umar are reported to have done as being neutral (as opposed to preferable) or even as being disagreeable [makrūh]. It is important to note that these examples pertain exclusively to reports of isolated actions. As I will indicate later during the discussion of the concept of ^{c}amal, Mālikī legal theory would regard isolated acts of this nature to be permissible as isolated acts but reprehensible or even forbidden as frequently repeated acts, because they are exceptional and were not intended to be normative, i.e., to constitute ^{c}amal. This Mālikī concept of reprehensibility [karāhiyah], which appears from these examples in "Ikhtilāf Mālik" to have been part of Mālik's legal reasoning, is clearly related to the concept of ^{c}amal as a standard of normative behavior.[1]

Thus, for example, Mālik transmits a ḥadīth, which reports that the Prophet once recited a certain sūrah during the course of leading ^{c}īd prayers. The Mālikī proponent states that they do not attach any importance ["fa-'innā lā nubālī"] whether one recites this sūrah while leading ^{c}īd prayers or any other sūrah. Thus, they regard the Prophet's action of selecting this sūrah as neutral. Ash-Shāfi^{c}ī disagrees sharply, however, and contends that one must regard

[1]See below, pp. 465-474.

it as preferable [mustaḥabb] to recite this sūrah during ᶜīd prayers: "You ought to regard things that the Prophet has done as preferable in all cases."[1]

The Mālikī proponent regards it as normative practice that the 'imām recite short sūrah's while leading the people in the sunset [maghrib] prayer. Thus, although Mālik transmits a ḥadīth that the Prophet once recited two long sūrah's at this prayer, they regard that practice to be makrūh. Ash-Shāfiᶜī contends that he cannot see how anyone could regard an action of the Prophet to be makrūh, and he takes this Mālikī opinion to be a clear indication of the weakness of their school in all matters [ḍaᶜf madhhabikum fī kulli shai'].[2] Similarly, the Mālikīs regard it to be normative practice that the 'imām while leading the people in any of the five congregational prayers not read excessively long sūrah's, because that would create difficulty for many of the people in the congregation. Thus, although Mālik transmits āthār which report that 'Abū Bakr and ᶜUmar once recited the longest sūrah's in the Qur'ān during the dawn [fajr] prayer, the Mālikī proponent indicates that those actions are regarded as makrūh. Ash-Shāfiᶜī contends on that basis that the Mālikīs have even gone against the ᶜamal of their 'imām's; he repeats that this is an indication of the overall weakness of their school; and he concludes that it indicates that

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[1]Ash-Shāfiᶜī, "Ikhtilāf Mālik," p. 205. [2]Ibid., p. 206.

the Mālikīs are so heedless and negligent that they should not even be permitted to give fatwā's much less to consider themselves superior to others in the knowledge that they have.[1] Later, in a similar instance where on the basis of an explicit directive of ᶜUmar ibn al-Khaṭṭāb the Mālikīs have concluded that a certain isolated act the Prophet is reported to have done is makrūh, ash-Shāfiᶜī accuses them again of total arbitrariness, of making decisions offhandedly only on the basis of their whims and without any reflection [tabaṣṣur] or sound deliberation [ḥusn rawīyah].[2]

Conclusions

Perhaps the chief difference between ash-Shāfiᶜī and Mālik in "Ikhtilāf Mālik" is that ash-Shāfiᶜī regards all legal texts in that work to be normative, regardless of whether they report statements, directives, habitual or isolated actions, or individual legal rulings, and he recognizes no qualitative differences between them. Thus, he regards a report of an isolated action the Prophet is reported to have done to indicate the Prophet's sunnah or the report of an isolated action that 'Abū Bakr or ᶜUmar are reported to have done to indicate their ᶜamal, although theoretically such actions, even if authentic, might not have been normative for the Prophet or 'Abū Bakr and ᶜUmar. Because ash-Shāfiᶜī

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[1]Ash-Shāfiᶜī, "Ikhtilāf Mālik," pp. 207-208.

[2]Ibid., pp. 215-216; for other examples of makrūh isolated acts, see pp. 210, 237-238.

does not recognize qualitative differences between the content of one text and another, he regards it as sufficient to consider only whether a text has been transmitted authentically, what the degree of authority is of the person to whom the text pertains--for example, the Prophet has a greater degree of authority than 'Abū Bakr or ᶜUmar--and whether or not contrary texts have been transmitted that pertain to persons of greater or equal authority.

One of the best illustrations that I know of in "Ikhtilāf Mālik" of ash-Shāfiᶜī's not recognizing qualitative differences between the contents of texts is his contention that an isolated ḥadīth is more authoritative than the report of a contrary Madīnan 'ijmāᶜ because both have come down by isolated transmissions [khabar al-infirād]. He presents this argument after a discussion in which he has stated that he wonders why the Madīnans have bothered to transmit ḥadīth in the first place, since they follow them so arbitrarily. The Mālikī proponent replies that they have often relied in such cases on Madīnan ijtimāᶜ ["mā 'jtamaᶜa ᶜalaihi 'ahl al-Madīnah"]. After noting how averse the Madīnans are to following isolated ḥadīth, ash-Shāfiᶜī contends that this adherence to Madīnan 'ijmāᶜ instead of contrary isolated ḥadīth is contradictory, because both the report of Madīnan 'ijmāᶜ and the text of the ḥadīth have come down to them by way of isolated transmissions [khabar al-infirād].[1]

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[1]Ash-Shāfiᶜī, "Ikhtilāf Mālik," pp. 260-261.

Thus, ash-Shāfi^{c}ī's concern is with the authenticity of transmission of the reports and rank of authority of the persons to whom the reports pertain. He holds that if the Madīnans regard the transmission of the report of Madīnan '*ijmā*^{c} to be authentic, then they must also regard the transmission of the isolated *ḥadīth* to be authentic if it came down by a similar channel of transmission. If both reports are authentic, then the isolated *ḥadīth* should take priority because the Prophet is more authoritative than anyone else. These are apparently the only considerations with which ash-Shāfi^{c}ī is concerned, and he does not recognize any qualitative difference between an authentic report of the consensus of a body of *fuqahā'*, learned in the Prophet's *sunnah* and normative ^{c}*amal*, on a specific precept of law and a report--albeit authentic--of a contrary isolated action that the Prophet is reported to have performed. When one evaluates texts from the standpoint of the qualitative differences between their content, assuming that they are both authentic, there is no question of whether or not the Prophet is regarded as more authoritative than a body of *fuqahā'*. Rather, it is a question of whether or not the opinion of that body of *fuqahā'* is a clearer indication of the Prophet's *sunnah* than the conjectural indication of an ambiguous, isolated report.

Finally, ash-Shāfi^{c}ī's "Ikhtilāf Mālik" is a work of central importance to the study of early Islamic intellec-

tual history and the development of legal theory, and it warrants detailed examination. Such detailed treatment of the work would require, of course, that the work be approached from both Shāfi^{c}ī and Mālikī perspectives. It would be immensely valuable, I believe, if one could study "Ikhtilāf Mālik" in the light of early Mālikī refutations of it, such as those of Ibn al-Mawwāz, Saḥnūn, Ibn ^{c}Abd-al-Ḥakam, al-Kinānī, al-Jahḍamī, Ibn al-Ḥaddād, and 'Abū Bakr al-Mālikī, which I referred to earlier and none of which has yet been studied by modern scholars.[1]

A General Survey of Madīnan ^{c}Amal in Traditional Works on Legal Theory

Mālikī Works

Of the traditional Mālikī works to which I had access, those of al-Qāḍī ^{c}Iyāḍ, ash-Shāṭibī, and Ibn Rushd contain the most thorough discussions of ^{c}amal, and I have drawn heavily from them in the remainder of the dissertation.[2] Properly speaking, Ibn Rushd's Bidāyat al-Mujtahid is not on legal theory; rather it is of the genre of ^{c}ilm al-khilāf, i.e., works that study the backgrounds of differing legal opinions. Thus, his discussions on ^{c}amal are scattered through the work in appropriate places. Ibn Rushd mentions, however, that he has discussed ^{c}amal at length in another work of his devoted exclusively to legal theory

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[1]See above, p. 115.

[2]See ^{c}Iyāḍ, 1:64-79; ash-Shāṭibī, Al-Muwāfaqāt, 3:56-91; Ibn Rushd, 1:9 (1), 60 (11), 102 (7), 133 (10), 140 (27).

["fī 'l-kalām al-fiqhī"].[1]

Neither al-Qarāfī nor Ibn Tūmart discusses Madīnan ᶜamal in depth in those of their works which I studied. They regard it, however, as a valid legal argument and as a necessary background against which to study isolated ḥadīth.[2] Similarly, Ibn al-Ḥājib states that isolated ḥadīth, although conjectural in themselves, can indicate definitive knowledge when supported by ancillaries [qarā'in], but he does not discuss those ancillaries in his Mukhtaṣar at great length or indicate that ᶜamal is one of them.[3] Another Mālikī faqīh, Ibn Farḥūn, touches on the ᶜamal and 'ijmāᶜ of the Companions; his discussion, however, appears to have been taken directly from al-Qāḍī ᶜIyāḍ.[4]

Unfortunately, I did not have access to manuscripts of the works of the early Mālikī legal theorists of Baghdād, such as al-'Abharī, al-Qāḍī Ibn al-Qaṣṣār, or al-Qāḍī ᶜAbd-al-Wahhāb[5] or to manuscripts or printed editions of the works

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[1]Ibn Rushd, 1:60 (11).

[2]Al-Qarāfī, 1:33, 128-129, 141; Ibn Tūmart, pp. 48-52.

[3]Ibn al-Ḥājib, pp. 72, 59-60.

[4]'Ibrāhīm ibn ᶜAlī IBN FARḤŪN, Kitāb ad-Dībāj al-Mudhahhab fī Maᶜrifat 'Aᶜyān ᶜUlamā' al-Madhhab (Egypt: ᶜAbbās ibn ᶜAbd-as-Salām ibn Shāqrūn, 1351/1932), p. 16.
IBN FARḤŪN (d. 799/1397) was a Mālikī faqīh of Moroccan origin who was born, lived, and died in Madīnah, although having travelled to Egypt, Jerusalem, and Syria toward the end of his life. He was qāḍī of Madīnah in 793 and was about seventy years old at death. Ziriklī, 1:47.

[5]See above, pp. 116-117.

on legal theory of such important Andalusian Mālikī legal theorists as 'Abū Bakr ibn al-ᶜArabī and al-Bājī.[1]

Ḥanafī Works

As-Sarakhsī, whose work Al-'Uṣūl has been indexed and well-edited and is one of the best available on Ḥanafī legal theory, discusses only Madīnan 'ijmāᶜ briefly and apparently draws no distinction between it and Madīnan ᶜamal. He holds that the 'ijmāᶜ of the Companions is a definitive legal argument and adds that it includes the highest type of Madīnan 'ijmāᶜ as well as the 'ijmāᶜ of the Prophet's family ['ijmāᶜ al-ᶜitrah], to which the shīᶜah subscribe. He holds that Mālik regarded only Madīnan 'ijmāᶜ to be valid and argues that it is not a definitive argument, disparaging those who regard it as such. Madīnah, he argues, is just another city, no more excellent than any other. He continues to say that there is not today a city the people of which are more ignorant or less disposed to doing good than those who inhabit Madīnah.[2]

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[1]For data on Ibn al-ᶜArabī, see above, p. 182, n. 3.
'Abū 'l-Walīd Sulaimān ibn Khalaf AL-BĀJĪ (404-474/1013-1081) was born in Bājah [Béja], and his family hailed from Baṭlayūs [Badajoz]. He travelled to the Muslim East to study at about the age of twenty-two, spent three years in the Ḥijāz, three more in Baghdād, about a year in Muṣil, and some time in Ḥimṣ and Damascus. He then returned to Andalusia, where he earned great renown as a scholar, served as a qāḍī, and became one of the most noted Cordovan Mālikī fuqahā' and legal theorists. He was about twenty years younger than Ibn Ḥazm. Ziriklī, 3:186; Kaḥḥālah, 4:261-262.

[2]As-Sarakhsī, 1:314, 318. For data, see above, p. 238, n. 2.

Ibn al-Humām and his commentator, 'Amīr Bādishāh, also do not seem to draw a distinction between Madīnan 'ijmā^c and ^camal. Unlike as-Sarakhsī, they hold that Madīnan 'ijmā^c, while not a definitive [qaṭ^cī] legal argument, is a sufficiently strong conjectural argument [ḥujjah ẓannīyah] to be given priority over contrary isolated ḥadīth.[1] Shāh Walī-Allāh mentions Madīnan ^camal in his 'Inṣāf, a work in which he attempts to explain how differences of opinion arose among the early fuqahā'. He does not treat it in any depth, however, and I found no discussions of ^camal in his Ḥujjah.[2]

Mu^ctazilī Works

Neither of the mu^ctazilī legal theorists whose works I had access to--al-Qāḍī ^cAbd-al-Jabbār and 'Abū 'l-Ḥusain al-Baṣrī--draws a distinction between Madīnan ^camal and Madīnan 'ijmā^c, and both employ similar arguments in rejecting the validity of Madīnan 'ijmā^c. They argue that the Qur'ānic textual authority for 'ijmā^c--Qur'ān, 4:115--is general, not specifying one group of believers to the exclu-

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[1]Ibn al-Humām, 3:245; for data, see above, p. 238, n. 2.

[2]Shāh Wālī-Allāh, Al-'Inṣāf fī Bayān Sabab al-Ikhtilāf (Lahore: Hai'at al-'Awqāf bi-Ḥukūmat al-Panjāb, 1971), pp. 9, 11; idem, Ḥujjat Allāh al-Bālighah, 2 vols. in 1 (Delhi: Kutubkhāneh-ye Rashīdīyah, 1373/1953).

'Aḥmad ibn ^cAbd-ar-Raḥīm al-Fārūqī (1110-1176/1699-1762), known as SHAH WALĪ-ALLĀH, was a famous and highly influential Ḥanafī faqīh, muḥaddith, and religious scholar of India, who worked actively for the revival of Islamic learning. He visited the Ḥijāz from 1143-1145/1730-1732. Ziriklī, 1:144-145.

sion of others. Therefore, any consensus that is made up of some of the believers to the exclusion of others is not a legitimate 'ijmā^c. Furthermore, they argue, Madīnah has no special excellence over other cities, and they see no point in the argument that Islam reached the state of its completion [kamāl] there. The same thing occurred in Makkah after it had been conquered. Nor do they regard the argument to be valid that the Qur'ān had been revealed in Madīnah.[1]

Shāfi^cī Works

Al-Ghazālī begins his terse discussion of Madīnan 'ijmā^c and ^camal by asserting that Mālik regarded only Madīnan 'ijmā^c to be authoritative. Madīnah, he asserts, never contained all of the Prophet's Companions, not before the hijrah or afterward, nor did Madīnah ever contain all of the people of learning in the generations after the Prophet. Rather, the people of learning have always been scat-

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[1]AL-QĀḌĪ ^cABD-AL JABBĀR al-'Asadābādī, Al-Mughnī, ed. 'Amīn al-Khūlī, vol. 17: Ash-Shar^cīyāt (Egypt: Al-Mu'assasah al-Miṣrīyah al-^cĀmmah li-'t-Ta'līf wa 't-Tarjamah wa 'ṭ-Ṭabā^cah wa 'n-Nashr, 1382/1962), pp. 205-215; and 'ABŪ 'L-ḤUSAIN Muḥammad ibn ^cAlī AL-BAṢRĪ, Kitāb al-Mu^ctamad fī 'Uṣūl al-Fiqh, ed. Muḥammad Ḥamīd-Allāh, 2 vols. (Damascus: Al-Ma^chad al-^cIlmī al-Fransī li-'d-Dirāsāt al-^cArabīyah, 1384/1964), 2:492 ff.

AL-QĀḌĪ ^cABD-AL-JABBĀR ibn 'Aḥmad al-'Asadābādī (d. 415/1025), one of the most famous of the later mu^ctazilī's, was the head of the school in his generation. He was qāḍī of Ray, which is where he died. Contemporary mu^ctazilī's referred to him as qāḍī al-quḍāh, calling none other by that title. Ziriklī, 4:47.

'ABŪ 'L-ḤUSAIN Muḥammad ibn ^cAlī AL-BAṢRĪ (d. 436/1044) was another of the important later mu^ctazilī's. Al-

tered through the various regions of the Muslim realm. Thus, he concludes, Mālik's position regarding Madīnan 'ijmā^c is without basis, al-Ghazālī's reasoning being that the only legitimate 'ijmā^c is that of a total consensus of the learned people of the 'ummah. Therefore, since all of the learned people of the 'ummah have never been in Madīnah at one time, Madīnan 'ijmā^c cannot possibly have ever constituted the type of 'ijmā^c that al-Ghazālī regards as valid. He continues to say that Madīnan ^camal cannot be regarded as legitimate on the basis of constituting a majority opinion, for in matters of fiqh, al-Ghazālī reasons, preponderance is not to be given to the opinions or actions of the majority merely by virtue of their being a majority. He concludes by saying that the Mālikīs have affected [takallafa] various justifications and excuses for their reliance upon ^camal, that he has refuted them sufficiently well in another book of his, "Tahdhīb al-'Uṣūl," and that there is no need to repeat the refutation.[1]

Unlike al-Ghazālī, al-Āmidī does not assert that Mālik held the 'ijmā^c of Madīnah to be the only valid type; nevertheless, he regards Madīnan 'ijmā^c to be invalid because Madīnah has no excellence over other cities. He mentions and refutes various arguments which he believes to

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though born in Baṣrah, he lived and died in Baghdād. He was a very extensive writer. Ziriklī, 7:161.

[1]Al-Ghazālī, 1:187-188; for data, see above, p. 223, n. 3.

represent the Mālikī justification of ᶜamal. He refutes an argument, for example, that the truth shall never leave the people of Madīnah because it was to their city that the hijrah was made, it is the site of the Prophet's grave, the place where the Qur'ān was revealed, and because the people of Madīnah learned the proper interpretation of the Qur'ān and had extensive knowledge of the Prophet's teaching and the circumstances of his life. He mentions another argument that their 'ijmāᶜ takes precedence over other types of 'ijmāᶜ, because the authority of their transmissions of ḥadīth takes priority over the transmissions of other cities. He mentions another argument, however, that Mālik regarded Madīnan 'ijmāᶜ only as having priority [i.e., being "'awlā"] in those matters of law upon which there had been differences of opinion elsewhere but that Mālik had not regarded it as impermissible for one to disagree with Madīnan 'ijmāᶜ. Al-Āmidī refutes the validity of Madīnan 'ijmāᶜ by asserting that the textual authority of 'ijmāᶜ is general, indicating a consensus of all, and that it cannot be restricted to just the learned people of Madīnah.[1]

Al-Baiḍāwī deals with Madīnan 'ijmāᶜ in a few words. He states that Mālik regarded it to be authoritative because of a ḥadīth that Madīnah rids itself of wickedness [khubth], which, he says, is a weak argument.[2] Another Shāfiᶜī legal

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[1]Al-Āmidī, 1:180-181; for data, see above, p. 223, n. 3.

[2]ᶜAbd-Allāh ibn ᶜUmar AL-BAIḌĀWĪ, Minhāj al-Wuṣūl

theorist, al-'Isnawī, argues--surprisingly for a Shāfi^{c}ī--that Madīnan 'ijmā^{c} and ^{c}amal, which he discusses separately, are not completely without authority and may take priority over isolated ḥadīth; his argument is quite similar to that of Ibn al-Humām. He alludes to the arguments of the Mālikī legal theorist Ibn al-Ḥājib and also has an interesting discussion of the concept of 'ijmā^{c} al-^{c}itrah.[1]

Ḥanbalī Works

The most detailed and comprehensive treatments of Madīnan 'ijmā^{c} and ^{c}amal that I know of among the non-Mālikī legal theorists whose works I have surveyed are those of Ibn Taimīyah and his close student and disciple Ibn Qayyim.[2]

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fī ^{c}Ilm al-'Uṣūl, with the commentaries, Manāhij al-^{c}Uqūl by Muḥammad ibn al-Ḥasan AL-BUDAKHSHI and Nihāyat as-Sūl by Jamāl-ad-Dīn ^{c}Abd-ar-Raḥīm AL-'ISNAWI, 3 vols. (Egypt: Maṭba^{c}at Muḥammad ^{c}Alī Ṣabīḥ, [1969]), 2:287.

^{c}Abd-Allāh ibn ^{c}Umar AL-BAIḌAWI (d. 685/1286) was a famous Iranian Shāfi^{c}ī, born in al-Baiḍā' near Shīrāz. He was qāḍī of Shīrāz and became renowned as a Qur'ānic commentator and for his work in other Islamic religious sciences. He died near Tibrīz. Ziriklī, 4:248-249.

[1]Jamāl-ad-Dīn ^{c}Abd-ar-Raḥīm AL-'ISNAWĪ, Nihāyat as-Sūl, in Minhāj al-Wuṣūl, by al-Baiḍāwī, 2:287-290; 3:180.

Jamāl-ad-Dīn ^{c}Abd-ar-Raḥīm ibn al-Ḥasan AL-'ISNAWĪ (704-772/1305-1370) was a famous Egyptian Shāfi^{c}ī faqīh, legal theorist, and philologist. He wrote numerous works and came to be regarded as the head of the Shāfi^{c}ī school in his day. He was appointed at one time head of the ḥisbah of Cairo and later, head of the treasury. Ziriklī, 4:119.

[2]For data on Ibn Taimīyah, see above, p. 52, n. 2.

Muḥammad ibn 'Abī Bakr IBN QAYYIM AL-JAWZIYAH (691-751/1292-1350) was born and died in Damascus and was one of the main students of Ibn Taimīyah. He edited and emended Ibn Taimīyah's writings and spread his teachings. Ibn Qayyim was imprisoned along with Ibn Taimīyah and was tortured

Their works are quite different in that regard from the somewhat earlier treatment of Madīnan 'ijmā^c by Ibn Qudāmah, who repudiates it in strong terms and seems to be following the argument of al-Ghazālī referred to above.[1]

Madīnan 'ijmā^c and ^camal are treated as separate topics in the Musawaddah of the Taimīyah family. Ibn Taimīyah discusses Madīnan 'ijmā^c, and his father, Shihāb-ad-Dīn, discusses Madīnan ^camal.[2] It is noteworthy that Ibn

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and publicly humiliated because of his support for Ibn Taimīyah. Ibn Qayyim was released from prison after Ibn Taimīyah's death. He had a great love for books and wrote down many in his excellent hand. It is said that people had great affection for Ibn Qayyim because of his pleasing personality. Ziriklī, 6:280-281; Kaḥḥālah, 9:106-107.

[1]Muwaffaq-ad-Dīn IBN QUDĀMAH, Rawḍat an-Nāẓir wa Junnat al-Manẓar fī 'Uṣūl al-Fiqh ^calā Madhhab al-'Imām 'Aḥmad ibn Ḥanbal (Cairo: Al-Maṭba^cah as-Salafīyah, 1378/1958), p. 72.

Muwaffaq-ad-Dīn ^cAbd-Allāh ibn 'Aḥmad IBN QUDĀMAH (541-620/1142-1223) was born in Palestine and received his education in Damascus. He travelled to Baghdād at about the age of twenty and spent four years there. He then returned to Damascus, where he lived until his death. Ibn Qudāmah wrote many works and is regarded as one of the most noteworthy of the Ḥanbalīs. Ziriklī, 4:191-192.

[2]For data, see above, p. 237, note 2.

This work was written by the Taimīyah family. The grandfather's writings--Majd-ad-Dīn--are introduced by "al-jadd"; those of Ibn Taimīyah's father, by "wālid shaikhinā"; and those of Ibn Taimīyah himself, by "shaikhunā".

Shihāb-ad-Dīn ^cAbd-al-Ḥalīm ibn ^cAbd-as-Salām IBN TAIMĪYAH (627-682/1230-1284), Ibn Taimīyah's father, brought his family to Damascus from Ḥarrān. He had knowledge of several fields of learning, taught, and gave fatwā's. He also wrote several works in different fields. Kaḥḥālah, 5:96-97.

Majd-ad-Dīn ^cAbd-as-Salām ibn ^cAbd-Allāh IBN TAIMĪYAH (d. 652/1254), Ibn Taimīyah's grandfather, was a highly regarded Ḥanbalī faqīh, muḥaddith, and Qur'ānic commentator. It is said that no person in his generation had greater knowledge than he of the Ḥanbalī school. He died in Ḥarrān around the age of sixty. Ziriklī, 4:129-130.

Taimīyah's attitude toward Madīnan 'ijmā^c in this work is much less sympathetic than his attitude in Ṣiḥḥat 'Uṣūl Madhhab 'Ahl al-Madīnah, which may reflect a change of outlook that he took during his life. He states in this work, for example, that Madīnan 'ijmā^c is not authoritative, which is contrary to his opinion in Ṣiḥḥat 'Uṣūl.[1] He mentions the argument that Mālik regarded it to be authoritative, even if non-Madīnans disagreed, and he states that some Mālikīs held that Mālik held only that type of Madīnan 'ijmā^c to be authoritative which went back to the Prophet's sunnah [i.e., al-'ijmā^c an-naqlī].[2] Ibn Taimīyah attaches no importance to such arguments, however, and describes them as merely avoiding the question, since he believes that there was no 'ijmā^c in Madīnah on other matters. He also mentions other Mālikī opinions, such as the opinion that Mālik relied on Madīnan 'ijmā^c only to establish preponderance in matters upon which there had been differences of opinion outside Madīnah. He mentions another opinion that Madīnan 'ijmā^c was constituted only by the consensus of Madīnan Companions, Successors, and the generation after them, and he quotes opinions of al-Qāḍī ^cAbd-al-Wahhāb, which I will discuss later.[3]

Shihāb-ad-Dīn ibn Taimīyah begins his discussion of Madīnan ^camal by asserting that it is not authoritative enough to be given priority over isolated ḥadīth. He points

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[1]Cf. Ibn Taimīyah, Ṣiḥḥat 'Uṣūl, pp. 26-28.

[2]See below, pp. 410-415.

[3]Āl Taimīyah, Al-Musawwadah, pp. 331-333; see below, pp. 409-419.

out, however, that the argument of those who regard ᶜamal as a valid basis upon which to establish the preponderance of one ḥadīth over a contrary one that is not in conformity with ᶜamal is that the contrary ḥadīth had been abrogated. He also states that 'Aḥmad ibn Ḥanbal may have regarded Madīnan ᶜamal as a valid basis upon which to establish the preponderance of one ḥadīth over a contrary one, because of the numerous instances in which he seems to have done that.[1]

Ibn Qayyim's treatment of Madīnan ᶜamal and 'ijmāᶜ is similar to Ibn Taimīyah's in Ṣiḥḥat 'Uṣūl, and I will present both of their treatments in greater detail when discussing the concept of ᶜamal.[2] Like Ibn Taimīyah, he draws a distinction between different categories of Madīnan ᶜamal--those types that go back to the Prophet, those that were instituted on the basis of the ijtihād of the early caliphs and the Companions, and those types that were instituted on the basis of later ijtihād. He regards these different categories as having different degrees of authoritativeness, the last category being the least authoritative, if authoritative at all. Ibn Qayyim repudiates Madīnan ᶜamal in very strong terms, however, when it is used as the basis for rejecting isolated ḥadīth, and similarly he does not acknowledge that the ijtihād of the Companions in Madīnah should ever take priority over the ijtihād of Companions elsewhere. He ar-

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[1]Āl Taimīyah, Al-Musawwadah, pp. 313, 239.

[2]See below, pp. 409-419.

gues that the quality of opinions ijtihād is based on depends solely on the calibre of the persons performing that ijtihād and that many of the best and most learned people of Madīnah left it at an early time for Kūfah, Baṣrah, Syria, and elsewhere. Similarly, he argues that the sunnah--which he believes to be constituted by isolated ḥadīth--is the criterion by which to judge ᶜamal and that Madīnan ᶜamal is not the criterion by which to judge the sunnah. One should rely on the sunnah of the infallible Prophet, he states, and not the ᶜamal of fallible Muslims.[1]

Ẓāhirī Works

Perhaps the sharpest criticism of Madīnan ᶜamal and 'ijmāᶜ comes from the Andalusian Ẓāhirī Ibn Ḥazm,[2] whom Brunschvig describes as one of the most virulent enemies of the Mālikī school.[3] After the manner of Ẓāhirī literalism, Ibn Ḥazm denies Madīnah any priority over other cities in matters of religious learning or ijtihād because there are no Qur'ānic texts or Prophetic ḥadīth that have obligated Mus-

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[1]Ibn Qayyim, 2:407-408; idem, (Saᶜādah), 2:361-373.

[2]ᶜAlī ibn 'Aḥmad IBN ḤAZM (384-456/994-1064) was born in Cordova and came from a prominent family; both his father and he occupied influential governmental posts. Ibn Ḥazm, however, later gave up his post and turned to writing and teaching. Because of his outspoken Ẓāhirī and anti-Mālikī opinions, Ibn Ḥazm came into conflict with the Andalusian Mālikī ᶜulamā', some of whom regarded him as a fitnah [trial; sower of dissension] and warned the people against him. He was banished from some regions of Andalusia. Nevertheless, he attracted a wide following, who were called "al-Ḥazmiyah". Ziriklī, 5:59.

[3]Brunschvig, p. 394.

lims to follow the people of Madīnah. If Madīnan consensus did, in fact, constitute an authoritative legal argument, Ibn Ḥazm reasons, God would have made that clear in the Qur'ān and the Prophet would have stated it in ḥadīth.[1] Since Ibn Ḥazm had been a Shāfi^cī prior to his becoming a Ẓāhirī, it is probably not surprising that he repeats ash-Shāfi^cī's contentions against Mālik.[2] Like ash-Shāfi^cī, he gives unquestioned priority to isolated ḥadīth over ^camal. Similarly, he points out that there have been extensive differences of opinion among the Madīnan ^culamā', and he holds that even the Seven Fuqahā' of Madīnah reached consensus on only a few questions.[3] He doubts the continuity of ^camal, contending like 'Abū Yūsuf and ash-Shaibānī, that it may in many cases go back to the overseer of the Madīnan marketplace.[4] In many cases Madīnan ^camal was instituted by the qāḍī or 'amīr of Madīnah, who--he asserts--did not hand down or execute rulings without conferring with the 'Umayyad caliphs in Syria about them. Thus, Ibn Ḥazm concludes, much of Madīnan ^camal has no greater authority behind it than that of the 'Umayyad caliphs.[5] It is worth noting, in con-

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[1]^cAlī IBN ḤAZM, Al-'Iḥkām fī 'Uṣūl al-'Aḥkām, ed. 'Aḥmad Muḥammad Shākir, 8 vols. in 1 (Egypt: Maṭba^cah as-Sa^cādah, 1345-1348/1926-1929), 4:205, 217; 6:170-171, cited by Brunschvig, p. 397.

[2]Brunschvig, p. 399; Ibn Ḥazm, 2:123.

[3]Ibn Ḥazm, 2:113; cited by Brunschvig, p. 399.

[4]See ibid., 2:113-119; 106-112; 4:209; 6:172, cited by Brunschvig, p. 399.

[5]Ibid., 4:218, cited by Brunschvig, p. 400.

clusion, that Brunschvig has concluded from his study of Ibn Ḥazm's anti-Mālikī polemics that syllogistic logic plays a predominant role in Ibn Ḥazm's reasoning, many of his refutations being strictly syllogistic.[1]

Syllogistic Logic and Traditional Argumentation

At the beginning of his discussion of Madīnan 'ijmā^c al-Qāḍī ^cIyāḍ, himself a very staunch advocate of the Mālikī school, tells his reader that the chief proponents of the other schools--be they fuqahā', theologians [mutakallimūn], muḥaddith's, or whatever--are a "single band ['ilb wāḥid] against us" on the question of the 'ijmā^c of Madīnah. But often, he asserts, they have based their arguments only on conjecture and surmise [takhmīn wa ḥadas], without having investigated the question carefully or conceived of it properly. He continues to say that the fanaticism of some of them and their desire to condemn the Mālikī school has led them even to calumniate the city of Madīnah itself. Accusing them of not having bothered to inquire of Mālikī scholars concerning the opinions to which they subscribe, many of these opponents have taken over the assumptions of others about what Mālikīs believe uncritically, attributing to Mālik as a result opinions and arguments that were not his. ^cIyāḍ cites al-Ghazālī as an example.[2]

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[1]Brunschvig, pp. 395-397. [2]^cIyāḍ, 1:67-68.

Several of the traditional non-Mālikī arguments I have surveyed probably fall into the category of arguments to which ᶜIyāḍ is referring. Some of them, for example, only appear to be means of dispensing with the questions of Madīnan '<u>ijmāᶜ</u> and ᶜ<u>amal</u>. Such arguments may reflect the insularity of the different schools of legal theory and their lack of interest in or knowledge of the reasoning of the proponents of other schools. It is remarkable, for instance, how brief their treatments of Madīnan '<u>ijmāᶜ</u> are compared to the very elaborate discussions these works contain of even the minutest points of the principles of legal theory to which their own schools subscribe.

There is, however, also another consideration which I believe is important in evaluating these arguments, namely, the syllogistic nature of many of them, which Brunschvig has observed in the case of Ibn Ḥazm's refutations. Thus, they argue, for example, that the textual authority for '<u>ijmāᶜ</u> is general, not specifying some persons instead of others. The people of knowledge in Madīnah constitute a particular, non-general grouping. Hence, Madīnan '<u>ijmāᶜ</u> cannot be authoritative.

It is possible, of course, that these theorists are not using syllogistic logic fairly in their arguments. It may be, for example, that they have selected premises for their syllogisms that will necessarily refute the authority of Madīnan '<u>ijmāᶜ</u>. The best way to check that would be to

compare the character of the syllogistic arguments they use in reference to Madīnan 'ijmāᶜ with syllogistic arguments they use elsewhere in their works when supporting principles to which their schools subscribe. In the case of a Ḥanafī legal theorist, for example, it would be interesting to compare his treatment of the concept of ᶜumūm al-balwā, since like Madīnan ᶜamal it pertains to the realm of probable inference, i.e., it is not probable that the ᶜulamā' of a city and the general masses of its people would be ignorant of matters of law that pertain to general necessity.[1]

Nevertheless, the question remains as to whether or not theorists accustomed to a syllogistic mode of thinking actually had the intellectual tools to analyze concepts like Madīnan 'ijmāᶜ and ᶜamal, which, I believe, are relative and not absolute legal arguments and pertain to the realm of probable inference. This makes concepts like Madīnan ᶜamal and 'ijmāᶜ somewhat difficult to evaluate syllogistically. For the syllogism by nature pertains to the inference of absolute knowledge. In order to infer a conclusion, the middle term of a syllogism must be stated either as a positive or negative universal [i.e., it must be distributed] in at least one of the premises. If the middle term cannot be stated universally, no conclusion can be drawn.[2] Thus, the syllogism is well-suited for working with "all-or-nothing" statements, but it is difficult to use when

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[1]See above, pp. 184-188. [2]Cohen and Nagel, pp. 79-80.

analyzing relationships that are relative, that lie between the absolute poles of "all and nothing".

Since neither Madīnan 'ijmā^{c} or ^{c}amal is an absolutely conclusive argument, legal theorists could determine by means of syllogistic logic what these concepts were not; however, it would have been considerably more difficult for them within a syllogistic mode of reasoning to identify what the concepts of Madīnan 'ijmā^{c} and ^{c}amal actually were, i.e., what qualitative value do they have, what is their relative merit?

Several of the preceding arguments to which I have alluded discuss Madīnan 'ijmā^{c} in terms of the Qur'ānic text, Qur'ān, 4:115, which they regard as textual authority for the concept of 'ijmā^{c}. Such argumentation establishes the validity of 'ijmā^{c} by appeal to Qur'ānic authority. They reason further that since this Qur'ānic authority for 'ijmā^{c} does not specify one group of Muslims as opposed to others, the consensus of a limited group--such as the 'ijmā^{c} of Madīnah--cannot lay claim to any validity on the basis of that verse. Such argumentation, however, does not evaluate the concept of 'ijmā^{c}--whether it be the 'ijmā^{c} of the 'ummah or the 'ijmā^{c} of a limited group--in terms of the intrinsic merit of 'ijmā^{c}, independent of the consideration that there is Qur'ānic authority for it. Thus, following 'ijmā^{c} is a matter of obedience to God, and one adheres to 'ijmā^{c} because, according to the interpretation they give

Qur'ān, 4:115 and similar verses, that is what God wants. This sort of reasoning, it seems to me, is not essentially different from Ibn Ḥazm's reasoning that no one may claim authority for Madīnan 'ijmā^c and ^camal because there are no explicit texts to support it, which there would certainly be, had God desired the people to adhere to Madīnan 'ijmā^c and ^camal. Each argument is authoritarian, and none of them is based on an assessment of the intrinsic merit of the concept itself.

It is interesting, by way of comparison, that ash-Shāṭibī argues for the validity of 'ijmā^c as a legal argument on the basis of the intrinsic merit of the concept itself. He likens 'ijmā^c to inductive reasoning--which he regards as the proper mode of reasoning by means of which to attain definitive conclusions--and regards 'ijmā^c as a sort of group induction which is authoritative because of the cumulative effect of the knowledge and reflection of those learned persons who constitute the 'ijmā^c. Thus, there is a high degree of probability that the conclusions upon which they reach 'ijmā^c will be correct, while there is a negligible degree of probability that those conclusions will be false. Furthermore, ash-Shāṭibī, as I mentioned earlier,[1] opposes the rigorously deductive textual literalism of later ^culamā' who felt that each principle and precept of law must be deduced from specific legal texts. Ash-Shāṭibī holds that such a

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[1]See above, pp. 223-224.

method of reasoning can rarely prove conclusively even the most certain principles and precepts of Islamic law, because such deduction generally is based on the interpretation of conjecturally worded texts.[1] Many of the traditional arguments regarding 'ijmā^c to which I have alluded in the preceding survey reflect, I believe, this tendency of deductive literalism which ash-Shāṭibī has in mind.

The discussion of the Ḥanafī Ibn al-Humām is a notable exception to the syllogistic conclusions which I have alluded to that Madīnan 'ijmā^c lacks Qur'ānic authority. Ibn al-Humām concerns himself with the relative, qualitative merit of the concept of Madīnan 'ijmā^c. Thus, he is not concerned solely with what Madīnan 'ijmā^c is not but also with what it actually is. Its relative merit, he holds, is that it is a "sufficiently strong conjectural argument" [ḥujjah ẓannīyah] for rejecting contrary isolated ḥadīth. The concept of a ḥujjah ẓannīyah would have been foreign, I believe, to those trained in a strictly syllogistic mode of reasoning. Consciously or unconsciously, the concept of a ḥujjah ẓannīyah involves considerations of probability as opposed to absolute, deductive inference.

Several concepts of Islamic law--especially in the Ḥanafī and Mālikī schools--pertain to the realm of probable inference instead of the realm of strict textual deduction.

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 1:42-61.

I have mentioned already the concepts of ᶜumūm al-balwā and Madīnan 'ijmāᶜ and ᶜamal, and one can add concepts like istiḥsān, sadd adh-dharā'iᶜ, and al-maṣāliḥ al-mursalah.[1] Similarly, the inference of Prophetic sunnah from the āthār and fatwā's of prominent Companions--such as is done in the Mālikī, Ḥanafī, and Ḥanbalī schools--involves considerations of probability, for example, that it is not probable that such a Companion was ignorant of the sunnah in that matter and would not have willfully gone against the sunnah. Hence, contrary isolated ḥadīth or reports of contrary actions are either abrogated or otherwise not normative.[2]

In light of this, I believe it is one of the important considerations in the intellectual history of Islamic legal theory to determine to what extent the use of a syllogistic mode of reasoning may have hampered later legal theorists from evaluating legal concepts like the above which did not lend themselves to comprehensive analysis in terms of absolute, deductive reasoning. I have mentioned earlier how the Shāfiᶜī school lent itself particularly well to analysis in terms of syllogistic reasoning because of the systematically deductive nature of ash-Shāfiᶜī's reasoning.[3] It may not be at all coincidental that critiques of the inadequacy of strictly deductive reasoning should have come from non-Shāfiᶜī legal theorists like ash-Shāṭibī.

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[1]For these concepts, see above, pp. 245-279.

[2]See above, pp. 161-170. [3]See above, pp. 222-223.

Modern logicians have drawn attention to the inadequacy of the strictly syllogistic mode of thinking for analyzing comprehensively the propositions and relationships of the real world, which rarely fall into the category of "all-or-nothing" propositions, for which the syllogism is so well-suited. De Morgan, for example--an important pioneer of symbolic logic--has observed that human beings because of the nature of their limited perceptive faculties are required to reason on the basis of probable inferences, absolute induction being suitable only for an omniscient being.[1] Symbolic logic grew out of the concern of the modern scientific mind to examine the relationships of the real world empirically, and logicians of symbolic logic have attempted to compensate for the inadequacies of classical syllogistic logic in that regard. Thus, for example, symbolic logic has focused on the concept of relationship and is concerned with how finite things and sets of things relate to each other. Hence, it is concerned with describing, analyzing, and understanding sets, systems, structures, and sub-structures. It has been able to go beyond the Aristotelian syllogism and examine compound propositions--like those in normal human thought and complicated syntax--instead of the simple, equational formula--A is B--which is the basis of syllogistic reasoning. Furthermore, symbolic logic has been

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[1]Cohen and Nagel, p. 165; see also pp. 111-114, 137.

able to evaluate the existential import of its premises and conclusions, which again was not in the scope of Aristotelian syllogistic logic.[1]

In conclusion, it might prove worthwhile to examine comprehensively the legal theories of the various Islamic schools of law by means of the tools of symbolic logic, instead of the traditional tools of syllogistic logic. Not only would such an approach promise to be able to evaluate the qualitative merit or existential import of those concepts like ᶜamal, ᶜumūm al-balwā, istiḥsān, and so forth, which pertain to the realm of probable inference, but it should also facilitate the articulation of each legal theory as a comprehensive system, instead of an aggregate of concepts, precepts, and principles. By articulating legal theories as structured systems, it would be easier to identify real inconsistencies and contradictions in them as well as consistent patterns, and it would be easier to identify fundamental similarities and differences between them and other systems, despite outward similarities and differences in details. For the outward similarities and differences in systems, according to symbolic logic, may be only coincidental and of passing significance, and these outward similarities and differences may conceal deceptively the fundamental similarities or differences that exist between the structure of the systems. Thus, for example, two systems may differ in outward particulars and yet have identical sub-struc-

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[1]Cohen and Nagel, pp. 111-118.

tures, which is called in symbolic logic an isomorphic relationship. There is, for example, as Cohen and Nagel have pointed out, an isomorphic relationship between the manner in which planets move around the sun, a pendulum swings upon the earth, and a teardrop falls from the eye.[1]

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[1]See Cohen and Nagel, pp. 137-140.

CHAPTER V

THE CONCEPT OF MADĪNAN ᶜAMAL

The Importance of ᶜAmal for Mālik

The ᶜamal of Madīnah was of fundamental importance to the legal reasoning of Mālik ibn 'Anas. He relied upon it so extensively that it constituted for him a conclusive, non-textual source of Islamic law in terms of which he would interpret, reject, or elaborate upon the textual sources of law to which he subscribed. The Muwaṭṭa' is essentially a source book of the precepts of Madīnan ᶜamal, and--as I have suggested--even the title of the work itself, "the much trodden path," is probably a figurative reference to the ᶜamal of Madīnah.[1] Reasoning by reference to ᶜamal is characteristic of Mālik and al-Laith ibn Saᶜd in their letters to each other and places their legal reasoning in contrast to that of 'Abū Yūsuf, ash-Shaibānī, and ash-Shāfiᶜī, all of whom insisted upon the priority of the textual sources of law over the non-textual.[2] Indeed, the point of difference between Mālik and al-Laith is not that they disagree about the prior-

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[1]See above, pp. 104-106.

[2]See above, pp. 314-317, 322, 325, 332-334, 339, 344-346.

ity of Madīnan ᶜamal but that Mālik, in his letter to al-Laith, does not concede to the validity of the ᶜamal of regions outside Madīnah which were settled by the Companions during the days of the early caliphs.[1]

There is general agreement in modern literature in Western languages, as pointed out earlier, that Madīnan ᶜamal constituted Mālik's most authoritative legal argument, although Goldziher, Schacht, and others noted that Mālik's legal reasoning had two fundamental components: ᶜamal and ra'y.[2] I will attempt to analyze Mālik's conceptualization and use of ᶜamal in greater detail in this chapter. As mentioned elsewhere, Mālik's use of ra'y can also be approached more comprehensively when analyzed in terms of the Mālikī conceptions of qiyās, sadd adh-dharā'iᶜ, istiḥsān, and al-maṣāliḥ al-mursalah, of which I have given a prefatory treatment.[3] Nevertheless, I believe that this identification of ᶜamal and ra'y as the two most fundamental components of Mālik's legal reasoning is basically sound. For, although Mālik subscribes to textual sources of law like the Qur'ān, musnad and mursal ḥadīth, and āthār, these sources are, as it were, dependent or ancillary sources in that they are evaluated against the semantic context of ᶜamal.[4] Mālik's conception of 'ijmāᶜ, which also

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[1]See above, pp. 313-314. [2]See above, pp. 302-304.

[3]See above, pp. 209-279.

[4]For treatment of these textual sources, see above, pp. 146-194.

constitutes an important source of law for him, is that of Madīnan local consensus, which is such a distinctive part of his terminology in the Muwaṭṭa'. Madīnan local consensus or ijtimāᶜ is always part of Madīnan ᶜamal, although--as is clear from analysis of the Muwaṭṭa'--there were also types of Madīnan ᶜamal which were not supported by Madīnan local consensus.[1]

As suggested before, ᶜamal and ra'y have different functions in Mālik's legal reasoning. Mālik uses ra'y, for example, when he reasons directly or by analogy from the well-established legal precepts of the Madīnan school. The validity, content, scope and purpose of those precepts, however, are set forth in the Muwaṭṭa' and elsewhere on the basis of the non-textual source of Madīnan ᶜamal. In such cases, therefore, ᶜamal is the referent of Mālik's ra'y. Similarly, principles like istiḥsān and sadd adh-dharā'iᶜ, which draw exceptions to general precepts because of special circumstances, imply that the ultimate purposes of such general precepts have been understood; these legal principles mark off, as it were, the intended scope of those general precepts. Here again, it is by reference to the ᶜamal of Madīnah that Mālik determines what the legal intent is behind the general precepts of the Madīnan school. Occasionally, however, Mālik uses ra'y not merely as a vehicle for doing ijtihād in applying the law but for determining which Madīnan precepts he regards to be

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[1]See below, pp. 427-431.

preferable in those matters regarding which there have been differences of opinion among the Madīnan fuqahā', as, for example, in some of the AN [al-'amr ᶜindanā] precepts.[1]

The Authority of Madīnan ᶜAmal for Mālik

There can be little doubt that Mālik regarded Madīnan ᶜamal to be authoritative for himself. That much is indicated by his extensive reliance upon it. Another question which arises, however, is that of to what extent Mālik regarded Madīnan ᶜamal to be authoritative for others, such as, for example, non-Madīnans, and to what extent he regarded it as binding upon them to follow the ᶜamal of Madīnah instead of other contrary sources of law.

ᶜAlāl al-Fāsī has suggested that Mālik looked upon the ᶜamal of Madīnah as a sure criterion to follow in those matters of law upon which there had been differences of opinion among the fuqahā'.[2] This hypothesis appears to be supported by my analysis of Mālik's terminology in the Muwaṭṭa', which shows that Mālik tended to cite his terms in matters regarding which there had been significant differences of opinion among the fuqahā'. In the majority of cases, Mālik cites these terms in matters upon which the Madīnans and the Kūfans have disagreed, although in a number of instances the

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[1]See above, pp. 209-279, and below, pp. 731-760.

[2]See below, pp. 534-535.

disagreements come instead from prominent Syrian, Makkan, Yamanī, and Egyptian fuqahā'.[1]

Mālik's reliance upon Madīnan ᶜamal in matters upon which there had been disagreements among the fuqahā' is a clear indication of how authoritative Mālik must have regarded Madīnan ᶜamal to be. For it follows that if Mālik regarded the ᶜamal of Madīnah to be authoritative in matters upon which there had been disagreements, he must have regarded it to be a fundamental reference in all matters of law, since there would be no question about the validity of Madīnan ᶜamal in matters of law upon which there had been general agreement.

Mālik's conception of the authoritativeness of Madīnan ᶜamal and his belief that it took precedence over the contrary ᶜamal of other regions which were settled by the Companions during the days of the early caliphate is unmistakably clear in Mālik's short letter to al-Laith ibn Saᶜd. Mālik describes Madīnan ᶜamal as that criterion which is sure to bring one salvation and success [an-najāh], if one adheres to it, and he warns al-Laith that he should fear God because of having departed from it in some matters.[2] One cannot but note how different Mālik is from ash-Shāfiᶜī in this regard. In championing the authority of isolated ḥadīth as an independent, textual source of Islamic law, ash-Shāfiᶜī acknowledges that

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[1]See below, pp. 530-538.

[2]See above, p. 315.

isolated ḥadīth often do not produce definitive knowledge [ᶜilm al-'iḥāṭah]. But ash-Shāfiᶜī reasons in a manner which is almost the opposite of Mālik's reasoning that following isolated ḥadīth in the absence of stronger and more explicit textual sources of law is essentially a religious duty and part of man's obedience to God. To reach a legal decision on the basis of something other than an explicit legal text or analogical reasoning based on a text, ash-Shāfiᶜī contends, is much closer to sinfulness ["'aqrab 'ilā 'l-'ithm"] than erring on the basis of following conjectural texts.[1] Mālik has argued to al-Laith in contrast, however, that one is more sure of winning the favor of God by adhering to the ᶜamal of Madīnah.

Mālik emphasizes that all people are dependent [tabᶜ] upon the people of Madīnah in matters of religious knowledge by virtue of the unique relationship of the Madīnans with the Prophet and the extent to which they adhered to his teachings. Mālik insists, furthermore, that the cumulative legacy of the people of Madīnah is one that cannot be claimed by the residents of any other city, and he concludes in his letter to al-Laith:

> Whenever a matter [of Islamic law] is predominant [ẓāhir] in Madīnah and followed in the ᶜamal, I do not believe that anyone has the prerogative to go against it on the basis of the limited part of this same legacy which they possess, this legacy which none may take for

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[1]See above, pp. 219-220.

himself or lay claim to. If the inhabitants of the various regions [of the Islamic empire] ['ahl al-'amṣār] should begin to say, "But this is the ᶜamal of our city" or "This is what those who preceded us had always been doing", they would not in doing that be following the surest and most reliable course, nor would they be doing that which is permissible for them.[1]

As I have pointed out, the distinctive point of difference between the letters of Mālik and al-Laith ibn Saᶜd is that al-Laith, while acknowledging the priority of Madīnan ᶜamal and local consensus over the ᶜamal of other regions, argues that those types of ᶜamal which were instituted by the Companions in Syria, Iraq, and Egypt during the days of the early caliphate are also legitimate. He contends that no one has the right to alter them today and holds that it is legitimate for him to disagree with Madīnan ᶜamal and to follow the contrary ᶜamal of other regions in those matters regarding which the prominent Madīnan fuqahā' have themselves disagreed.[2]

Since we do not know what Mālik's response to al-Laith's letter was, it is difficult to determine whether or not Mālik continued to adhere to the position he is reported to have set forth in his letter. Nevertheless, if the reports are authentic that the ᶜAbbāsid caliph al-Manṣūr offered to make Mālik's Muwaṭṭa' the standard law code of his empire and force the people of all regions to follow it, they might indicate that Mālik came to hold a position much closer to that of

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[1]See above, pp. 315-318. [2]See above, pp. 322-326.

al-Laith ibn Sa^{c}d.[1] According to these reports, Mālik refused al-Manṣūr's request. Some indicate that Mālik's main consideration was that of maṣlaḥah and that Mālik held it would be too difficult to force the people of different regions to give up practices which they believed to be correct and which were supported by the ḥadīth and legal opinions that had reached them. According to other reports, Mālik is said to have held--almost identically to al-Laith ibn Sa^{c}d--that the divergent practices of the Islamic regions were valid by virtue of the fact that they reflected similar divergences in the practices of the Companions, from whom the peoples of those regions had learned their practices.[2]

As I will indicate shortly, some later Mālikī legal theorists such as al-Qāḍī ^{c}Abd-al-Wahhāb held that Mālik had not regarded all parts of Madīnan ^{c}amal to be equally binding and that he had regarded it to be permissible that one disagree with those types of ^{c}amal which were of lesser authority, such as, for example, those types of Madīnan ^{c}amal which had originated with the ijtihād of the Companions.[3] However this may be, Mālik's terminology in the Muwaṭṭa' argues that Mālik did not regard all parts of Madīnan ^{c}amal to be equally authoritative, even though, according to my analysis of his terminology, it does not correspond to the categories of ^{c}amal set forth by al-Qāḍī ^{c}Abd-al-Wahhāb, ^{c}Iyāḍ, and others. One

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[1] See discussion of these reports below, pp. 388-393.

[2] See above, pp. 99-100. [3] Below, pp. 409-419.

of the very distinctive features of Mālik's terminology is that it indicates which parts of Madīnan ᶜamal were supported by local consensus and which were not. Mālik's sunnah terms seem to be used exclusively for those types of ᶜamal which Mālik regards as having originated with the sunnah of the Prophet. The term AMN [al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā], while standing for Madīnan ijtimāᶜ and often including precepts that must have originated in the sunnah of the Prophet, seems always to contain at least some element of ijtihād as well. It is also quite possible, as I have indicated in my analysis of AMN that it stands for a preponderant or a majority consensus of the Madīnan fuqahā', while other terms which specifically deny any disagreement on their precepts--such as AMN-X, A-XN, S-XN, and so forth--appear to stand for total consensus of the Madīnan fuqahā'.[1] It appears to me that these distinctions in Mālik's terminology indicate that he regarded some types of Madīnan ᶜamal to be more authoritative than others. Had he regarded all types of Madīnan ᶜamal to be equally authoritative regardless of whether or not they were supported by local consensus or whether they had originated exclusively in the sunnah or contained some element of ijtihād, there would have been no need for such distinctions. Rather, Mālik would have probably deemed it sufficient to indicate that a precept was part of Madīnan ᶜamal and leave it at that.

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[1]See below, pp. 409-419.

The Authority of ᶜAmal
as a Unified Legal Code

Thus, it appears difficult to form a comprehensive picture of Mālik's conception of the authoritativeness of Madīnan ᶜamal. Some evidence indicates that he regarded all aspects of Madīnan ᶜamal to be authoritative and that he disapproved strongly of people not following it. Other evidence carries the implication that Mālik drew distinctions between the authoritativeness of some ᶜamal precepts as opposed to others and, hence, that he would have objected more strongly to people failing to follow the more authoritative parts of ᶜamal than the less authoritative parts.

Before being able to determine how authoritative Mālik regarded Madīnan ᶜamal to be, one must, of course, first attempt to determine what Mālik regarded the basis of authoritativeness in legal matters to be. It seems to be generally the case that later legal theorists determined the authoritativeness of precepts of Islamic law solely in terms of their historical authenticity. They were concerned with the ultimate truth of whether or not the Prophet did lay down such a precept, what he actually meant by such and such a statement, whether a certain instance of ijtihād was more in keeping with his legislation than another, and so forth. According to my understanding of Mālik's terminology, it would appear that the distinctions he draws between various precepts

indicates his concern for such considerations of ultimate authenticity. Would concern for authenticity, however, have been the only consideration which Mālik took into account in assessing the authoritativeness of ᶜamal precepts? If, for example, two contrary opinions on an identical precept of law involved virtually the same amount of conjecture and speculation without decisive proof, would Mālik have regarded both of those opinions to be equally authoritative? In the case of an AN precept regarding the authenticity of which the Madīnan fuqahā' were divided, would Mālik have regarded the opinion supported by ᶜamal--i.e., the AN--to be no more authoritative than the opinion not supported by ᶜamal, assuming again that both opinions involved signficant amounts of conjecture?

'Abū Zahrah holds that concern for maṣlaḥah is one of the most central concerns in Mālik's legal reasoning and accounts for his positions on legal matters as diverse as his attitude toward the transmission of ḥadīth, the high regard he had for local customs, not to mention the authority he granted to the principles of istiḥsān, sadd adh-dharā'iᶜ, and al-maṣāliḥ al-mursalah.[1] If, indeed, concern for maṣlaḥah did constitute such a central part of Mālik's reasoning, might not this concern also have informed Mālik's attitude regarding

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[1]See above, pp. 60, 83, 204-206, 245-279 ; and see below, pp. 474-481, in which I consider the possible connection in Mālik's thought between concern for maṣlaḥah and the concept of normative ᶜamal.

the importance of adhering to Madīnan ᶜamal--both its more conjectural and its more definitive precepts?

One hypothesis which comes to mind in this regard and which I believe deserves consideration is that Mālik may have regarded it to be important that one adhere to Madīnan ᶜamal even in its more conjectural aspects because of the practical social need for an established and unified legal code. At some point in the development of a legal system codification of the law becomes necessary in order to unify it and make it well-known to the people who are going to be bound by it and to the judges and other authorities who will be responsible for administering it. Without such codification administration of the law would be very chaotic and in some situations virtually impossible. Thus, the maṣlaḥah of establishing such a unified code is very great, and at some time the academic debate among the fuqahā' over the greater authenticity of this opinion as opposed to that would have to be placed in proper perspective so that it not stand in the way of the constitution of such a code. It might also be pointed out in this regard that the need for a code would be greatest in those matters of law which were the most conjectural. For it is those matters exactly--because of the greater element of conjecture which pertains to them--about which the debates of the fuqahā' could go on endlessly. One can imagine the chaos which would result if laws pertaining to evidence, property rights, inheritance, marriage, and divorce were continu-

ously altered according to the vicissitudes of scholarly debate concerning them.[1]

Thus, in addition to considerations of authenticity, Mālik may also have evaluated the authority of Madīnan ᶜamal precepts in terms of the maṣlaḥah which accrued from following them systematically and the mafsadah which would result from altering them whenever the sentiment of scholarly debate tended to favor one conjectural opinion instead of another. Hence, all elements of Madīnan ᶜamal would have had an additional degree of authority in Mālik's eyes by virtue of the fact that they had come to be part of an established legal practice, which--no doubt--Mālik believed to be based on authentic foundations. For, even though the authenticity of some ᶜamal precepts was more conjectural than others--for example, those precepts upon which there was no local consensus among the Madīnan fuqahā'--they were precepts which had now come to be incorporated into the lives of the people; they had become the procedure of the judiciary, and, in Mālik's words according to the report of Ibn 'Abī 'Uwais, they were well-known among the knowledgeable and ignorant alike.[2]

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[1]It might be noted that the function of legal schools [madhāhib] in Islamic law is essentially one of setting down a normative ᶜamal in conjectural matters, because of the practical necessity that a procedure, a course of action--a "madhhab"--be set down in such areas. Similarly, the practical value of a madhhab is greatest in those areas which are the most conjectural, since there is little cause for lack of unanimity regarding more definitive issues.

[2]See below, pp. 539-543.

The need for legal codification and Mālik's refusal of al-Manṣūr

The question which naturally arises is that, if Mālik did regard Madīnan ᶜamal as being authoritative even in its conjectural areas because of the need for a codified system of law which had sufficient permanence, why would Mālik have refused al-Manṣūr's request to make the Muwaṭṭa' the legal standard of his empire?[1]

Of course, the first question in this regard is that of whether or not al-Manṣūr actually did make such a request and Mālik actually refused it. In light of the extensive support which the ᶜAbbāsids came to give the Ḥanafī school, for example, it is plausible that these reports about al-Manṣūr were fabricated to show that al-Manṣūr--the paternal ancestor of all the ᶜAbbāsid caliphs[2]--had himself acknowledged the superiority of the Madīnan over the Kūfan school.

Assuming, however, that these reports are authentic, I can conceive of two interpretations of them which would be in keeping with the hypothesis that Mālik was concerned with standard codification of law. The first of these is that Mālik may not have been sympathetic with the ᶜAbbāsid state. I mentioned earlier the possibility that Mālik had supported or sympathized with the anti-ᶜAbbāsid revolt of an-Nafs az-Zakīyah and that it may have been for that reason that the ᶜAbbāsids had Mālik publicly flogged and his arms stretched

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[1]See above, pp. 99-100. [2]See above, p. 51, n. 2.

until his shoulders were dislocated.[1] In such a case, Mālik may have refused al-Manṣūr's offer because he did not want to lend support to the newly established ᶜAbbāsid regime by encouraging them to adopt the Madīnan school. It may also have been the case that, at the time the offer was made, the future of the ᶜAbbāsid regime was not certain, and Mālik might have feared that the future of the Madīnan school would be endangered if the ᶜAbbāsids adopted and espoused it officially, constrained the people of other regions to adhere to it--which is according to the reports what al-Manṣūr had in mind--and then were thrown out of power by another change in events.

One can also deduce from these reports that Mālik felt that standardized codes of legal practice were necessary at the local and regional levels but need not be insisted upon at the national level throughout the empire. Mālik is reported to have observed that there was no need for al-Manṣūr to constrain the people to follow one universal code because Mālik's school had come to predominate in the Ḥijāz and the Muslim West, al-Laith ibn Saᶜd's in Egypt, al-'Awzāᶜī's in Syria, and so forth. Thus, Mālik apparently held that there had come to be sufficient uniformity of ᶜ<u>amal</u> at the regional level and that it would be inadvisable to constrain the inhabitants of those regions to follow another code instead because of the intensity with which they adhered to their

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[1]See above, pp. 121-123.

local practices and regarded them to be authentic.

Mālik's Conceptualization of the Madīnan Community

Mālik's letter to al-Laith ibn Sa^{c}d, as already mentioned, sets forth very clearly his conception of the Madīnan community and his belief that all other communities were dependent [tab^{c}] upon them in matters of religious knowledge, a view which al-Laith is also in general agreement with. Mālik regards the ^{c}amal of the people of Madīnah to be superior to that of other regions because of the closeness of the Madīnans to the Prophet, their faithfulness in following what they learned from him, and the fact that they continued to adhere closely to the teachings and injunctions of the Prophet over the preceding three generations until the time of Mālik. He stresses the importance of the Madīnans having been the direct recipients of the Prophetic message and that they witnessed everything which transpired during the Prophet's career in their city. Similarly, Mālik believes that the Madīnan caliphs, whom he describes as the best of the 'ummah, continued to follow the sunnah of the Prophet closely. Mālik indicates, furthermore, that he regards the ijtihād of the Madīnan caliphs to have been excellent, by virtue of their extensive knowledge of the sunnah, their access to other Companions from whom they could inquire about matters of which they had no knowledge, and their recent experience [ḥadāthat ^{c}ahdihim] of having been with the Prophet and having learned

Islam from him at first hand. Thus, Mālik believes that they were capable of discerning those opinions which were strongest and most worthy of being followed and made into ᶜamal. Finally, Mālik holds in this letter that the legacy of the Companions in Madīnah was passed on to the Madīnan Successors--the generation of his teachers--and that they had continued to adhere to that legacy with the same attachment and integrity.[1]

As pointed out at the beginning of this dissertation, it is not my purpose in it to determine the historical verity of Mālik's conceptualization of the Madīnan community but rather to determine what it was and, in so far as possible, how Mālik attempted to account for it. Al-Laith ibn Saᶜd, of course, is in general agreement with Mālik's conception. Mālik's contemporary 'Abū Yūsuf and his much younger contemporaries ash-Shaibānī and ash-Shāfiᶜī very clearly were not. None of them would question the excellence of the early Madīnan community. Each of them, however, doubts that there is a continuity between the ᶜamal of that early community and the ᶜamal of Madīnah in Mālik's day. They insist upon textual verification of ᶜamal and refuse to accept as valid any Madīnan claims that are unsupported by such proof. Denial of the superior position of Madīnah in religious knowledge is clear in each of their arguments, although 'Abū Yūsuf's, as has been pointed out, is directed specifically against Syrian ᶜamal, which, as I have suggested, 'Abū Yūsuf--the ᶜAb-

[1]See above, pp. 319-321, 325.

bāsid chief qāḍī--may have desired to dislodge as a preliminary step to a general policy of instituting a more uniform ᶜamal in the ᶜAbbāsid realms in accordance with the Ḥanafī school.[1]

Ash-Shaibānī makes it quite clear that, in the absence of explicit textual support, he does not regard claims based solely on Madīnan ᶜamal to take any priority over contrary claims based on the ᶜamal of Baṣrah, Syria, or other cities:

> And how can it be permissible for the people of Madīnah to be arbitrary in this matter and select these four stipulations from [other possible] stipulations. How do you think you would be able to refute the people of Baṣrah, were they to say, "We want to adhere to two different stipulations;" or the people of Syria, were they to say, "We want three different stipulations."? Hence, it is proper that people do what is right and not be arbitrary . . . . I will not follow any opinion unless the people of Madīnah bring me a text ['athar] supporting what they say, so that I might follow that. But they have no text in this matter . . . .[2]

Ash-Shāfiᶜī, whose arguments are strikingly similar to ash-Shaibānī's, pushes the claim of arbitrariness even further in his rejection of the Mālikī reliance upon ᶜamal not only in the absence of texts but in opposition to texts. Because of their failure to follow the apparent [ẓāhir] implications of texts which they transmit and deem to be authentic, the Mālikīs, according to ash-Shāfiᶜī's view, are the most culpable of people in failing to follow the Prophet and their own Madīnan traditions. He makes the charge that they are incom-

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[1]See above, pp. 336-337. [2]See above, p. 339.

petent and should not be permitted to give legal opinions.[1]

How, then, must Mālik have accounted for his belief in the continuity of Madīnan ᶜamal, by virtue of which he regarded Madīnan ᶜamal to be such a fundamental non-textual source of Islamic law? There are in the Muwaṭṭa', first of all, numerous instances of Mālik's indicating the source and continuity of given types of ᶜamal by reference to ḥadīth, āthār, or Qur'ānic verses which contain the injunctions behind those types of ᶜamal or reflect them having been put into practice in an earlier age.[2] One of the best examples of that in the instances of ᶜamal precepts in the Muwaṭṭa' which I have studied are the precepts in conjunction with which Mālik uses the term -zĀIb ["wa hādhā 'l-'amr al-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm bi-baladinā"]. Rarely, in those examples does ᶜamal provide information which is not already contained in the texts which Mālik cites in conjunction with the term. The function of the term -zĀIb seems to be in such cases that it makes explicit that the actions or injunctions in those texts are a normative part of Madīnan ᶜamal and that they have always been part of Madīnan local consensus.[3]

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[1]See above, pp. 348-350.

[2]See, for example, below, pp. 560-564, 571-576, 623-626, 629-632, 656-658, 661-665, 703-723, 734-743.

[3]See below, pp. 585-596.

Of the ᶜamal precepts in the Muwaṭṭa' which I have studied, however, the -zĀIb precepts are exceptional in that so little additional information is provided from the non-textual source of ᶜamal. Often when Mālik cites supporting texts in conjunction with ᶜamal precepts he provides additional information from the non-textual source of ᶜamal which is not contained in those texts or is indicated in them only with a degree of ambiguity. I have referred several times to the precept regarding making legal judgments on the basis of the oath of the plaintiff supported by a single witness; Mālik cites ḥadīth and āthār to support the continuity of this precept. None of these texts, however, provides such fundamental information as the limitation that this procedure is only to be applied to money matters and not cases of libel, criminal punishments, and so forth. Furthermore, none of the texts sets forth the procedure which is to be followed, all of which Mālik provides from Madīnan ᶜamal.[1] Similarly, Mālik cites ḥadīth which report that the Prophet implemented annulment of marriage by liᶜān in the case of one of his Companions who had discovered his wife committing adultery but did not have sufficient proof to prove it, and, as mentioned, the procedure of liᶜān is also supported by Qur'ānic texts. None of these textual sources, however, provides the additional information that a couple whose marriage is annulled by liᶜān may not remarry, which Mālik provides from the source of Madīnan

[1]See below, p. 514.

ᶜamal.[1] Mālik cites texts which report that the Prophet and his Companions performed mash occasionally when performing ritual ablutions. None of these texts, however, describes how mash was performed, which information Mālik provides from ᶜamal.[2]

In cases such as these the function of Mālik's citing texts appears to be essentially one of indicating the source and continuity of the ᶜamal in question. Such texts are, however, ancillaries to ᶜamal, because ᶜamal itself constitutes the fundamental source of information. Furthermore, it is the non-textual source of ᶜamal which has the greater authority. For, as indicated by the quotation of Ibn al-Qāsim in the Mudawwanah, whenever there are discrepancies between the content of such texts and the content of Madīnan ᶜamal, it is ᶜamal which is followed. The idea of the continuity of Madīnan ᶜamal is quite clear in Ibn al-Qāsim's statement, and he reasons that if the legal implications of such texts were not put into ᶜamal by the Companions and, hence, were not part of the ᶜamal of the Madīnan Successors, who received their practices from the Companions, it would not be legitimate to put them into ᶜamal now.[3]

'Abū Yūsuf, ash-Shaibānī, and ash-Shāfiᶜī, as I have indicated, insist upon textual sources of law to support all

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[1]See below, p. 562. [2]See below, pp. 655-656.

[3]See above, pp. 179-180.

precepts of Madīnan ᶜamal. Nevertheless, as shown in my analysis of Mālik's terminology, there were no sound texts in either the pre- or post-Shāfiᶜī period for many of the most fundamental precepts of Madīnan ᶜamal.[1] Since Mālik could not rely in such cases upon textual ancillaries to indicate the source and continuity of Madīnan ᶜamal, on what basis would he have argued for the authenticity of such types of ᶜamal?

In addition to citing texts to indicate the source and authenticity of some types of ᶜamal, Mālik occasionally uses legal reasoning to defend or explain some ᶜamal precepts. Mālik reasons, for example, that the absence of ᶜamal restricting the disposal of properties designated by bequests is an indication that the Prophet permitted bequests to be altered after they had been made and set down in writing--which the Prophet had enjoined people to do--except in the exceptional case of tadbīr.[2] Similarly, Mālik defends an AMN precept regarding bequests to manumit jointly owned slaves by indicating that it is the necessary consequence of the laws of bequests, inheritance, and the manumission of slaves.[3]

In several examples Mālik draws analogies as a means of defending or explaining ᶜamal precepts. Mālik supports the AMN precept about the permissibility of using the hunting

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[1]See below, pp. 553, 556, 570-571, 604-605, 599-600, 606-608, 618, 622, 660, 750, 753-754; cf., 655-656.

[2]Below, pp. 705-706. [3]Below, pp. 711-713.

dogs of a Magian by reference to analogy.[1] He points out that the contract of mukātabah is not analogous to indebtedness and that those have erred who regarded it as such; he then sets forth what he believes to be the correct analogy supporting an AN precept pertaining to mukātabah.[2] Similarly, Mālik defends an AMN precept regarding the inheritance of an illegitimate son by reference to analogy.[3]

As I have indicated in my analysis of Mālik's terminology, the analogical precepts discussed above may have been the result of ijtihād, and it may be for that reason that Mālik defends them by analogy. For, if they were the results of ijtihād, they would not have been supported by explicit texts in the Qur'ān or in ḥadīth. Nevertheless, Mālik also supports precepts by means of legal reasoning which appear to be of the category of what later theorists termed "ᶜamal naqlī", types of ᶜamal that had been instituted during the Prophetic era.[4] The precept about the permissibility of altering bequests, which I referred to earlier, would be such an example. Similarly, Mālik states in his presentation of the ᶜamal regarding the custom of ᶜaqīqah that the same stipulations that pertain to sacrificial animals in ritual sacrifices, like those of pilgrimage, pertain to the animals sacrificed in ᶜaqīqah, and he indicates that ᶜaqīqah is analo-

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[1]See below, p. 693. [2]Below, p. 744. [3]Below, p. 703.
[4]See below, pp. 410-415.

gous to ritual sacrifices.[1] Similarly, Mālik explains that women who continue to bleed for excessively long periods after childbed are analogous to women who suffer from continuous bleeding in addition to normal menstrual bleeding.[2] Although Mālik cites a ḥadīth supporting Madīnan ᶜamal regarding the amount of indemnity to be paid for backteeth which are knocked out, he also cites the analogy of Ibn ᶜAbbās whereby he sought to convince Marwān ibn al-Ḥakam that the indemnities for backteeth were indeed the same as those for frontal teeth.[3]

In most of these instances there are no directly pertinent legal texts to support the validity of ᶜamal, with the possible exception of the example referred to above regarding indemnities for backteeth, which is supported by the ẓāhir [apparent] meaning of a ḥadīth Mālik cites. Although Mālik cites ḥadīth and āthār supporting the validity and continuity of the precept pertaining to making judgments on the basis of the oath of the plaintiff supported by the testimony of a single witness, Mālik defends and further explains that precept by some of the most extensive legal reasoning that he sets forth anywhere in the Muwaṭṭa'.[4] Similarly, although Mālik cites ḥadīth to indicate the origin of the controversial precept of qasāmah and cites the longest series of terms

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[1]See below, p. 673. [2]Below, pp.750-751.

[3]Below, p. 740. [4]See below, pp. 571-575.

in the Muwaṭṭa' to indicate that it is a well-established part of Madīnan ᶜamal, Mālik defends the distinctively Madīnan interpretations of the precept of qasāmah on the basis of the principle of maṣlaḥah.[1]

Mālik's Conception of the Legacy of the Madīnan ᶜUlamā'

The citation of supporting texts or the use of supporting legal reasoning are, however, only ancillary supports of Madīnan ᶜamal for Mālik. Madīnan ᶜamal is primary, and they are secondary. Mālik does not question the validity of precepts established through Madīnan ᶜamal, and I know of no example of his rejecting a precept established through Madīnan ᶜamal because of a well-established contrary text or because of contrary legal reasoning. Rather Mālik appears to use texts and legal reasoning, when they corroborate ᶜamal, as additional proof of the validity of an ᶜamal which Mālik himself already regards as being well-established.

The validity of Madīnan ᶜamal for Mālik is essentially a function of the reputation of the Madīnan community and especially that tradition of superior Madīnan ᶜulamā' from whom Mālik and his teachers received their instruction. Mālik's conception of the Madīnan community is quite clearly set forth in his letter to al-Laith ibn Saᶜd. His conception of the status of the Madīnan ᶜulamā' from whom he received

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[1]See below, pp. 717-718.

his instruction is, perhaps, even more explicit in the report attributed to Mālik and transmitted by ᶜIyāḍ from Ibn 'Abī 'Uwais. In that report, Mālik again refers to Madīnan ᶜamal as "a legacy which one generation has handed down to another until our own time." It would appear from that same report, however, that in Mālik's mind the heirs and preservers of that legacy were the Madīnan ᶜulamā' who were in the tradition of his teachers. Mālik describes these ᶜulamā' as "the people of learning and excellence and the 'imām's whose examples are worthy of being followed from whom I received my learning," and he describes them further as those who were heedful of God. As in his letter to al-Laith ibn Saᶜd, Mālik stresses in this report the continuity of the teaching and practice of these ᶜulamā' through the generation of the Successors back to that of the Companions.[1]

It is not likely that Mālik would have regarded all of the Madīnan ᶜulamā' as heirs, guardians, and transmitters of ᶜamal. On the contrary, one would expect him to have been as selective in this regard as he is reported to have been in determining which of the Madīnan ᶜulamā' he would receive his learning from. In the quotation above, Mālik speaks of "people of learning and excellence" and "'imām's whose examples are worthy of being followed" from whom he had received his instruction. He probably would not have included in this

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[1]See below, p. 539.

category those people of learning in Madīnah whom Mālik is reported to have rejected as teachers because of their incompetence, their holding to heresies or heretical innovations, their lack of integrity, or their naivete and lack of good judgment despite much devotion and worship. Mālik took great pride in his having kept apart from such persons in his education, and he is reported to have described them as being persons without worth or benefit. If he regarded them as unworthy sources for transmitting ḥadīth and āthār, which are secondary legal sources for Mālik, it is very unlikely that he would have looked to them as carriers of Madīnan ᶜamal, which constituted for Mālik a primary source of law.[1]

The āthār of the Muwaṭṭa' give a good indication, I believe, of the calibre of Madīnan ᶜulamā' whom Mālik looked to as the carriers of the tradition of Madīnan ᶜamal. In the ᶜamal chapters which I have studied in my analysis of Mālik's terminology, for example, Mālik relies very heavily on the example and the sayings of ᶜAbd-Allāh ibn ᶜUmar as the prototype for many types of Madīnan ᶜamal, and he looks to other prominent Madīnan ᶜulamā' as well, such as the Successors ᶜUrwah ibn az-Zubair, al-Qāsim ibn Muḥammad, and his teacher Ibn Shihāb az-Zuhrī.[2]

Probably another reason why Mālik felt confident that he had learned the proper content of Madīnan ᶜamal from his

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[1]See above, pp. 72-76. [2]See below, pp. 688-689.

teachers was because of the proximity of their generation to that of the Prophet and his Companions. Mālik's primary teachers--az-Zuhrī, Rabīᶜah, Yaḥyā ibn Saᶜīd, and so forth[1]--were of the second generation of the Successors. They had received their learning primarily from older Successors--such as Saᶜīd ibn al-Musayyab, ᶜUrwah ibn az-Zubair, Sulaimān ibn Yasār, al-Qāsim ibn Muḥammad, and the other Seven Fuqahā'--and from a few of the Companions of the Prophet who had lived to old ages. Thus, the generation of Mālik's teachers was only decades removed from the period when significant numbers of both the older and younger Companions had still been alive, and they received their learning from older Successors, who had grown up and received their learning during that period. No doubt, Mālik must have regarded this 'isnād between himself, his teachers, their teachers, and the Companions to have been a reliable vehicle through which to verify the content of Madīnan ᶜamal.

One can gather from the āthār of the Muwaṭṭa' a picture of prominent Madīnan ᶜulamā' and 'imām's as transmitters and guardians of Madīnan ᶜamal in large things and small. Mālik cites an 'athar, for example, which reports that coupons [ṣukūk] were distributed among the people during the early 'Umayyad period to be redeemed for food which was scheduled to be delivered at a harbor on the Red Sea not far from Madī-

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[1]See above, pp. 62-72.

nah. The people of Madīnah, however, began to speculate on the coupons before the food was delivered. Zaid ibn Thābit[1] and another Companion of the Prophet, who is not named, are reported to have gone to Marwān ibn al-Ḥakam, who was then governor of Madīnah, and asked him if he was trying to make ribā [the Islamic concept of usury] permissible by permitting the people to engage in such speculation. Marwān, according to the report, called out his guard [al-ḥaras] and sent them among the people with the order to put an end to the speculation and return the coupons to their rightful owners.[2]

I have pointed out in my analysis of the ᶜamal chapters in the Muwaṭṭa' how ᶜAbd-Allāh ibn ᶜUmar is portrayed in some of the āthār of those chapters as a transmitter and guardian of Madīnan ᶜamal.[3] Mālik cites other āthār in the Muwaṭṭa' which portray Ibn ᶜUmar in this capacity of enjoining right and forbidding wrong, instructing the people, and insuring that they understand what the correct ᶜamal for various matters should be.[4] Similarly, Mālik transmits āthār which portray Ibn ᶜUmar's father, ᶜUmar ibn al-Khaṭṭāb, as instructing the Madīnans from the minbar [pulpit] about various aspects of ᶜamal. I have mentioned in my analysis of the terminology of the Muwaṭṭa' the example of ᶜUmar ibn al-

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[1]See above, p. 166, n. 4. [2]Muwaṭṭa', 2:641.

[3]See below, pp. 658, 688-689.

[4]See, for example, Muwaṭṭa', 1:168, 169,217.

Khaṭṭāb's teaching the Madīnans from the minbar at Friday community prayers that it is not required of them to prostrate themselves after reciting certain verses of the Qur'ān after the reading of which it is customary that one prostrate oneself.[1] Mālik transmits another 'athar according to which ᶜUmar ibn al-Khaṭṭāb, while on the minbar during Friday prayers, made an example of a latecomer to the prayer in order that the people not forget that they should come early to Friday prayers and that they should bathe themselves prior to coming.[2] According to another 'athar which Mālik transmits, ᶜUmar ibn al-Khaṭṭāb also instructed the people from the minbar on the wording of the tashahhud--an invocation which is made during the course of ṣalāh.[3]

Āthār such as these, which Mālik has transmitted in his Muwaṭṭa', give a good indication of how Mālik probably conceived of that legacy of the Madīnan ᶜulamā' which, according to the reports attributed to him, he believed had been handed down from one generation of Madīnan ᶜulamā' to another until his own time. In so far as those types of ᶜamal were concerned which were part of the customary practices of the Madīnan people or which had been instituted by the executive authority of the Madīnan judiciary, Mālik probably held that

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[1]See below, pp. 629-632, and above, pp. 194-195.

[2]Muwaṭṭa', 1:101-102. [3]Ibid., 1:90-91.

the explicit or tacit support of them by the Madīnan ᶜulamā' was sufficient indication of their validity even if the ultimate source of the ᶜamal was not certain. Mālik's assumption in such cases, I believe, would have been that the Madīnan ᶜulamā' would not have condoned such types of ᶜamal or have watched them grow up or be instituted erroneously without having made their objections to them known. Such an assumption would, of course, lend particular authority to matters supported by local consensus. As for those types of ᶜamal about which the Madīnan ᶜulamā' were divided, the ultimate validity of the ᶜamal would have been more conjectural, depending on the nature and extent of the disagreement among the ᶜulamā'. As I have suggested, it is quite possible that Mālik did not regard such types of ᶜamal to be as authoritative as those which were supported by local consensus and that, for this reason, he makes the distinction in his terminology between those types of ᶜamal upon which there had been local consensus and those upon which there had been disagreement.

The Different Categories of Madīnan ᶜAmal

Classifications of Later Theorists

In his letter to al-Laith ibn Saᶜd, Mālik identifies two sources of Madīnan ᶜamal: 1) the sunnah of the Prophet and 2) the ijtihād of those who came into authority after

the Prophet and the prominent Madīnan Companions and Successors.[1] Similarly, the important Mālikī legal theorist al-Qāḍī ᶜAbd-al-Wahhāb al-Baghdādī[2], al-Qāḍī ᶜIyāḍ, and the two Ḥanbalī legal theorists Ibn Taimīyah and his student Ibn Qayyim al-Jawzīyah divide Madīnan ᶜamal into two basic categories, those which go back to the era of the Prophet and his sunnah and those types of ᶜamal which go back to the ijtihād of Madīnans in the post-Prophetic period.

ᶜAmal derived from the sunnah

These four theorists refer to ᶜamal which goes back to the era of the Prophet as "ᶜamal naqlī"--an ᶜamal which transmits, as it were, precepts of law from the Prophet to later generations.[3] Al-Qāḍī ᶜAbd-al-Wahhāb and ᶜIyāḍ identify four sources of ᶜamal naqlī, each of which they regard as constituting part of the sunnah of the Prophet. They hold that ᶜamal naqlī originates in either 1) express statements ['aqwāl], injunctions, or directives of the Prophet, 2) examples of behavior ['afᶜāl] which the Prophet set, 3) tacit permission ['iqrār, taqrīr] which the Prophet gave to actions which transpired around him, or 4) the Prophet's tark, i.e.,

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[1]See above, pp. 319-320. Al-Laith ibn Saᶜd also indicates his awareness that some parts of Madīnan ᶜamal originated in the ijtihād of Companions and Successors; see above, pp. 323-324.

[2]For data, see above, pp. 116-117 , n. 3.

[3]ᶜIyāḍ uses the expression "al-'ijmāᶜ an-naqlī"; ᶜIyāḍ, 1:68-69.

his having intentionally omitted the requiring of certain things which would have become commonplace requirements, if he had obligated the Madīnans to do them.[1]

As examples of the first two types of ᶜamal naqlī, ᶜIyāḍ refers to the wording of the call to prayer ['adhān] and the 'iqāmah, which is given just prior to congregational prayers to indicate to the people that they should arise and prepare to pray. He also cites the ᶜamal of what times during the day the various five daily, congregational prayers are to be held, the ᶜamal of omitting the recitation of the basmalah[2] during congregational prayers, the ᶜamal of using certain traditional Madīnan weights and measures [the Madīnan ṣāᶜ and mudd] for the collection of zakāh, and the institution of waqf properties. From generation to generation, ᶜIyāḍ holds, the people of Madīnah have handed down ᶜamal in matters such as these with the same degree of certainty with which they have handed down knowledge of the site of the Prophet's grave, his mosque and minbar, and even the site of his city, and they are also, ᶜIyāḍ contends, matters that the people of Madīnah must have learned from the Prophet, even though there may not be specific texts to indicate that.[3]

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[1]ᶜIyāḍ, 1:68-69; the citations from al-Qāḍī ᶜAbd-al-Wahhāb are given in Āl Taimīyah, Al-Musawwadah, pp. 331-333.

[2]Basmalah: The Qur'ānic formulaic saying, "In the name of God, the most gracious, most merciful."

[3]ᶜIyāḍ, 1:68.

ᶜIyāḍ does not give an example of the third type of ᶜamal naqlī according to his definition, i.e., those types which go back to the tacit approval of the Prophet. Some of the ᶜamal precepts which I have analyzed in the analysis of Mālik's terminology would appear to fall in this category.[1] ᶜIyāḍ points out, however, that he regards the Prophet's tacit approval for matters of this nature to be verified by the fact that no disapprovals ['inkār] of the Madīnan ᶜulamā' have been transmitted regarding such types of ᶜamal.[2] ᶜIyāḍ's reasoning would be based on the assumption which I believe Mālik held regarding the relationship of the Madīnan ᶜulamā' to the transmission and preservation of Madīnan ᶜamal, namely, that the quality and status of the Madīnan ᶜulamā' was such that they would not have condoned such types of ᶜamal if they had not regarded them to be legitimate and had known that the Prophet had objected to them.[3] As an example of the fourth type of ᶜamal naqlī, ᶜIyāḍ cites the precept of Madīnan ᶜamal that no zakāh is collected on fruit, provender, and green vegetables, which I have included in my analysis of Mālik's sunnah terms.[4] I also encountered other ᶜamal

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[1]See below, pp. 588, 617. Also the Madīnan ᶜamal that it is permissible to make contracts of musāqāh on lands that contain some open [baiḍā'] areas and the ᶜamal precept that it is permissible to sell swords, copies of the Qur'ān, and so forth for gold or silver, although they contain certain minimal amounts of gold or silver would appear to be of this category. See below, pp. 618-622.

[2]ᶜIyāḍ, 1:68. [3]Above, pp. 408-409.

[4]ᶜIyāḍ, 1:68; see below, p. 555.

precepts in my analysis of the terminology of the Muwaṭṭa' which appear to go back to the tark of the Prophet and to be of this fourth category of ᶜamal naqlī.[1]

Ibn Qayyim defines ᶜamal naqlī quite similarly to ᶜAbd-al-Wahhāb and ᶜIyāḍ. He gives the examples of the ᶜamal precepts of waqf properties, various agricultural customs, the tradition of calling the 'adhān from high places, the ᶜamal of repeating the words of the 'adhān twice and the words of the 'iqāmah once. Ibn Qayyim also includes in the category of ᶜamal naqlī the transmitted knowledge among the Madīnans of the locations of places and the sizes of various traditional weights and measures.[2] Ibn Taimīyah's definition of ᶜamal naqlī is essentially that of ᶜAbd-al-Wahhāb and ᶜIyāḍ also. He speaks of another separate category of Madīnan ᶜamal, however, which he defines as ᶜamal regarding which there are two contrary ḥadīth or two contrary conclusions of qiyās in a given matter and Madīnan ᶜamal supports one of them and not the other. According to the definitions of ᶜAbd-al-Wahhāb and ᶜIyāḍ, however, this type of ᶜamal in the case of contrary ḥadīth would be regarded to be of the category of ᶜamal naqlī, if the ḥadīth were authentic. For in that case, the ḥadīth in conformity with Madīnan ᶜamal would be textual evidence that the ᶜamal in question went back to the era of the Prophet.[3]

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[1]See below, pp. 706-707, 736-737.

[2]Cited from 'Iᶜlām by 'Abū Zahrah, Mālik, pp. 335-336.

[3]Ibn Taimīyah, Ṣiḥḥat al-'Uṣūl, p. 27. He is of the opin-

All four of these legal theorists state that ᶜamal naqlī is an authoritative legal argument [ḥujjah].[1] Ibn Taimīyah even claims that each of the four primary sunnī 'imām's, including 'Abū Ḥanīfah, regarded this type of ᶜamal to be authoritative, which at least in the case of 'Abū Ḥanīfah appears to be clearly mistaken in light of the fact that 'Abū Ḥanīfah as well as several other prominent early fuqahā' disagree with Madīnan ᶜamal precepts which are of this category of ᶜamal naqlī.[2] ᶜIyāḍ refers to Madīnan 'ijmāᶜ which is of the category of ᶜamal naqlī as a definitively conclusive legal argument [ḥujjah qaṭᶜīyah], which takes priority over all contrary isolated legal texts or contrary types of legal reasoning. Both ᶜIyāḍ and ᶜAbd-al-Wahhāb state, furthermore, that all Mālikīs agree on the authoritativeness of such types of ᶜamal naqlī.[3] Nevertheless, there are numerous instances

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ion that ash-Shāfiᶜī followed Madīnan ᶜamal in cases in which there were two contrary ḥadīth and one was supported by Madīnan ᶜamal. Ibn Taimīyah is not sure what the position of Ibn Ḥanbal was in this matter but cites a report according to which Ibn Ḥanbal said, "If the people of Madīnah hold to the validity of a ḥadīth and have an ᶜamal in accordance with it, then it is the ultimate [al-ghāyah]." He states that Ibn Ḥanbal is also reported to have preferred to follow Madīnan fatwā's and gave them priority over the opinions of the fuqahā' of Iraq.

[1] ᶜIyāḍ, 1:68-69; Āl Taimīyah, Musawwadah, pp. 331-333; Ibn Taimīyah, Ṣiḥḥat 'Uṣūl, p. 23; Ibn Qayyim, 'Iᶜlām, cited by 'Abū Zahrah, Mālik, pp. 335-336.

[2] See, for example, below, pp. 556, 562, 565, 572-573, 586, 592; cf. 552, 558, 590, 597-598.

[3] ᶜIyāḍ, 1:68-69; Āl Taimīyah, Musawwadah, pp. 331-333.

of precepts in the Muwaṭṭa' which would be of the category of ᶜamal naqlī but which were not supported by Madīnan local consensus.[1] None of these theorists seems to take this category of ᶜamal naqlī into consideration, and, since there were prominent Madīnan fuqahā' who differed regarding the validity of such precepts, it is doubtful that Mālik would have regarded them to be as authoritative as those ᶜamal precepts which, as indicated by his terminology, were supported by Madīnan local consensus.

ᶜAmal derived from ijtihād

ᶜIyāḍ speaks of only one general category of Madīnan ᶜamal in addition to ᶜamal naqlī, namely, those types of Madīnan ᶜamal which were the result of inference [istidlāl] or ijtihād by the Madīnan fuqahā' in the post-Prophetic period. As in his treatment of ᶜamal naqlī, ᶜIyāḍ considers only those types of ᶜamal in this category that were supported by Madīnan local consensus, and he draws no distinction between types of ᶜamal which were supported by local consensus and types of ᶜamal which were not. Furthermore, ᶜIyāḍ draws no distinction between types of ᶜamal that resulted from earlier or later instances of ijtihād.[2]

Al-Qāḍī ᶜAbd-al-Wahhāb, according to the information

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[1]See, for example, below, pp. 572-573 (MḍS), 665-667 (S), 669 (AN), and the following examples from the AN chapter, pp. 754-755, 734-736, 737-739, 741-742, 746-748, 749-750, 752-754.

[2]ᶜIyāḍ, 1:69-70.

cited by Ibn Taimīyah, Ibn Taimīyah, and Ibn Qayyim draw the distinction, however, between types of Madīnan ᶜamal which resulted from ijtihād in the days of the Madīnan caliphate and ijtihād which resulted in ᶜamal after that time. Ibn Taimīyah refers to ᶜamal that resulted from ijtihād during the first three caliphates until the death of ᶜUthmān as "ᶜamal qadīm" [ancient ᶜamal]. As mentioned earlier, Ibn Taimīyah holds that no center of Islamic learning in the early period vied with Madīnah in matters of religious learning until after the death of ᶜUthmān.[1] Furthermore, the Madīnan caliphate, as such, may be said to have ended with ᶜUthmān, since the fourth caliph, ᶜAlī ibn 'Abī Ṭālib, moved his capital to Kūfah, although--as mentioned earlier--some modern historians have claimed that his shift in capital was only a matter of strategy.[2] Finally, Ibn Taimīyah refers to types of Madīnan ᶜamal which resulted from ijtihād in the period after the Madīnan caliphate and in the age of the Successors as "ᶜamal muta'akhkhir" [later ᶜamal].[3]

ᶜIyāḍ states that most Mālikīs have held that types of Madīnan ᶜamal which resulted from ijtihād--and, again, ᶜIyāḍ makes no distinction between earlier and later ijtihād--are not binding. Some of them--especially the Mālikīs of

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[1]See above, p. 52. [2]See above, p. 49.

[3]Ibn Taimīyah, Ṣiḥḥat 'Uṣūl, pp. 26-28; cf. Āl Taimīyah, Musawwadah, pp. 331-332; Ibn Qayyim, 'Iᶜlām, cited by 'Abū Zahrah, Mālik, pp. 335-336.

Baghdād--ᶜIyāḍ states, even held that types of Madīnan ᶜamal which had resulted from ijtihād were not a valid basis upon which to establish the preponderance [tarjīḥ] of one legal opinion that had resulted from ijtihād over another. Other Mālikīs, ᶜIyāḍ continues, held that Madīnan local consensus which resulted from ijtihād was not authoritatively binding but that it was, nevertheless, a sound basis upon which to establish the preponderance of one legal opinion over another. Finally, ᶜIyāḍ states that some of the Mālikīs of the Muslim West [al-maghrib] have held that such types of ᶜamal were of binding authority and that they should always take precedence over contrary isolated ḥadīth or contrary types of legal reasoning. Other Mālikīs, he concludes, have disagreed with them greatly on this matter.[1]

According to the information cited by Ibn Taimīyah, ᶜAbd-al-Wahhāb regarded none of the instances of Madīnan ᶜamal which resulted from ijtihād to be authoritative. Ibn Taimīyah adds, however, that some Mālikīs regarded the category of ᶜamal which he defines as ᶜamal qadīm to be a valid legal argument when supported by local consensus. In such cases, they regarded it as a legitimate type of 'ijmāᶜ, although distinctive from the 'ijmāᶜ of the 'ummah and not as authoritative.[2] According to Ibn Taimīyah, ᶜAbd-al-Wahhāb held that the category of ᶜamal which Ibn Taimīyah refers to as "ᶜamal

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[1]ᶜIyāḍ, 1:69-70. [2]Āl Taimīyah, Musawwadah, pp. 331-332.

muta'akhkhir" was not regarded as authoritative by meticulous Mālikī scholars [al-muḥaqqiqīn],[1] which would imply apparently that there were those Mālikī scholars who regarded it to be authoritative but whom al-Qāḍī ᶜAbd-al-Wahhāb did not regard as being meticulous.

Both Ibn Taimīyah and Ibn Qayyim hold Madīnan ᶜamal qadīm in high regard. Ibn Qayyim holds that Madīnan ᶜamal which was instituted under the Madīnan caliphs is of the category of sunnah, and both he and Ibn Taimīyah draw a sharp distinction between ᶜamal qadīm and later ᶜamal, which Ibn Qayyim insists must not be confused with each other. Neither of them regards ᶜamal muta'akhkhir to be authoritative, and Ibn Qayyim insists that it must never be given priority over contrary isolated legal texts. It should be noted, however, that neither Ibn Taimīyah or Ibn Qayyim draws a distinction between instances of Madīnan ᶜamal qadīm or ᶜamal muta'akhkhir which were supported by Madīnan local consensus and instances of them which were not.[2]

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[1]Ibn Taimīyah, Ṣiḥḥat 'Uṣūl, pp. 27-28.

[2]Ibid; Ibn Qayyim, 'Iᶜlām, cited by 'Abū Zahrah, Mālik, pp. 335-336. Ibn Taimīyah states that ash-Shāfiᶜī, according to one transmission from him, regarded ᶜamal qadīm to be authoritative. Similarly, Ibn Taimīyah reasons that 'Aḥmad ibn Ḥanbal would have held ᶜamal qadīm to be authoritative because of the fact that he regarded the ijtihād of the first four caliphs to be authoritative. In so far as Ibn Qayyim's position is concerned, namely, that the ᶜamal of the Madīnan caliphs is of the category of sunnah, it is in keeping with the position in legal theory that the āthār and fatwā's of the Companions can be used as a source of sunnah; cf. above, pp. 161-169.

Mālik's Terminology and the Classifications of Later Theorists

The preceding classifications of Madīnan ᶜamal by later legal theorists focus primarily on the source of ᶜamal precepts in their categorization of them. They are primarily concerned with whether or not an ᶜamal precept originated in the sunnah of the Prophet or was authorized by the Prophet's tacit approval or whether it originated from the ijtihād of the Madīnan ᶜulamā' in the post-Prophetic period. Ibn Taimīyah and Ibn Qayyim, of course, also divide those types of ᶜamal which resulted from ijtihād into those which originated during the years of the Madīnan caliphate and those which originated afterward. None of these classifications, however, draws a distinction between types of Madīnan ᶜamal which were supported by Madīnan local consensus and types of Madīnan ᶜamal which were not. ᶜIyāḍ refers to each of the categories of ᶜamal which he defines as a type of Madīnan 'ijmāᶜ. Ibn Taimīyah and Ibn Qayyim, on the other hand, refer to each of the categories of Madīnan ᶜamal which they define simply as ᶜamal without specifying what the relationship of those precepts to Madīnan local consensus was. Probably, these theorists did not hold that there was any distinction between Madīnan 'ijmāᶜ and Madīnan ᶜamal.

Mālik, as I have stated earlier, indicates in his letter to al-Laith ibn Saᶜd that he recognizes two ultimate sources of Madīnan ᶜamal: the sunnah of the Prophet and the ijtihād

of Madīnans in the post-Prophetic period.[1] Furthermore, the concept of ᶜamal naqlī as set forth by later theorists is also clear at various points in the Muwaṭṭa' and in some of the reports and statements attributed to Mālik. Mālik states, for example, that the S-XN precept ["as-sunnah al-latī lā 'khtilāf fīhā ᶜindanā"] that there is no call to prayer or 'iqāmah in ᶜīd prayers is a matter which has been part of the continuous ᶜamal of Madīnah from the time of the Prophet until the present.[2] Similarly, the concept of ᶜamal naqlī is reflected in some of Mālik's terms in the Muwaṭṭa', such as -zĀIb ["wa hādhā 'l-'amr al-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm bi-baladinā;" the people of knowledge in our city have always held to the validity of this matter][3] or Mālik's statement that a certain matter has always been part of the ᶜamal of the people.[4]

According to a report transmitted by ᶜIyāḍ, 'Abū Yūsuf, while in the retinue of the ᶜAbbāsid caliph, who was visiting Madīnah, once contended in Mālik's presence that the Madīnans transmitted no ḥadīth to support the manner in which they called the 'adhān, which differed somewhat from the Kūfan customary practice. Mālik is reported to have replied to 'Abū Yūsuf:

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[1]See above, p. 319. [2]See below, p. 660.

[3]For discussion of the -zĀIb precepts, see below, pp. 583-599.

[4]See below, pp. 618-622.

> Glory be to God! I have never seen anything more strange than this. Every day, five times a day the call to prayer is made over the heads of witnesses. [It is something] which the sons have inherited from their fathers from the time of the Messenger of God, upon whom be peace, until the present time. In such matters do you need "so and so transmitting on the authority of so and so"? On the contrary, we regard this to be sounder than ḥadīth.[1]

Similarly, ᶜIyāḍ reports that 'Abū Yūsuf inquired about what proof the Madīnans had regarding their definition of certain traditional weights and measures. Mālik's students are reported to have produced several of the merchants of Madīnah, who brought with them the weights and measures which they had inherited from their fathers, who had inherited them from their fathers, who had been Companions of the Prophet. According to this report, Mālik is said to have told 'Abū Yūsuf that he regarded such evidence to be much stronger than ḥadīth.[2]

Nevertheless, although Mālik seems to have held to a concept essentially the same as what later theorists termed "ᶜamal naqlī" and although he seems to have been aware that not all Madīnan ᶜamal came from this source but that some of it came instead from ijtihād, the terminology which Mālik uses in the Muwaṭṭa' reflects concerns which are not present in

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[1]ᶜIyāḍ, 1:224.

[2]Ibid. I mentioned earlier the statement attributed to Mālik's teacher Rabīᶜah, which also reflects the concept of ᶜamal naqlī and indicates Rabīᶜah's strong preference of it over contrary isolated ḥadīth: "One thousand [transmitting] from one thousand is preferable to me than one [transmitting] from one. For 'one [transmitting] from one' would tear the sunnah right out of our hands." See above, p.174.

the classifications of the later theorists whom I have mentioned. Furthermore, even in terms of its concern for the source of Madīnan ᶜamal precepts, Mālik's terminology does not correspond exactly with the classifications of these theorists.

Mālik's terminology, as I have suggested in my analysis of it, is not strictly systematic. It is apparently not made up of rigorously defined terms which never overlap with each other. On the contrary, at least some of the terms which Mālik uses seem to fluctuate between assigned terminological usages and their customary semantic range. The term "'amr", for example, has a wide range of usages in Mālik's terminology. I have suggested, therefore, that it is more accurate to conceive of Mālik's terminology in the sense of its consisting of inclusive and exclusive categories of terms. That is, it consists of terms which share some common ground with each other--which constitutes the points at which these terms overlap--but which also contain certain distinctive qualities which make them exclusive and different.[1]

It must be noted to begin with that the sources of the ᶜamal precepts with which Mālik cites his terms are not always indicated clearly in the Muwaṭṭa'. This may indicate that Mālik was not greatly concerned about identifying the source of such precepts or of communicating to others what he be-

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[1]See below, pp. 523-529.

lieved the sources of them to be. In such cases one can only estimate what the source of ᶜamal was, and that estimation sometimes involves considerable speculation. Nevertheless, it appears from my analysis of Mālik's terminology, that each of the terms and expressions which I studied can include the category of ᶜamal naqlī.[1] The sunnah terms, however, seem quite consistently to exclude any category of Madīnan ᶜamal but ᶜamal naqlī and are distinctively different in that regard from terms like AMN and AN, which include elements of ijtihād as well as elements of sunnah.[2] Similarly, each of the instances of -zĀIb which I analyzed would fall in the category of ᶜamal naqlī, although there are many other -zĀIb precepts in the Muwaṭṭa' which I did not study and of which this may not be true. Most of Mālik's ᶜamal terms fall in the category of ᶜamal naqlī, and the contents of each of the ᶜamal chapters, with the possible exception of one, would fall within that category as well.[3] Another consistent and distinctive feature of Mālik's sunnah terms which I observed is that they are contrary to analogy with related precepts of law. Furthermore, differences of opinion about these sunnah precepts have resulted from the extension of those analogies to include the sunnah precepts.[4]

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[1]See below, pp. 576-578, 611-612, 678, 686, 725-727, 757-758.

[2]See below, pp. 576-578, 725-727, 757-758.

[3]Below, pp. 611-612, 678, 686.

[4]Below, pp. 581-582, 660-661, 667, 716-718.

The term AMN, on the other hand, while clearly including ᶜamal naqlī in some examples,[1] also includes types of Madīnan ᶜamal which resulted from ijtihād. Indeed, it may be argued that each example of AMN which I have analyzed, even those which clearly contain elements of ᶜamal naqlī, also contains at least some element of ijtihād, and, as I have pointed out in the analysis of Mālik's terminology, Mālik is reported to have indicated in a report attributed to him and transmitted by his nephew Ibn 'Abī 'Uwais that AMN consisted of the legal opinions of the Madīnan fuqahā'.[2] AMN, therefore, would appear to be a broadly inclusive term. I have cited examples in which it includes the scope of the sunnah term S-XN, while in those same examples S-XN appears to exclude some of the material referred to by AMN, namely, those aspects of the precepts in question which resulted from ijtihād.[3] Similarly, I have cited an example in which AMN appears to include the range of A-XN ["al-'amr al-ladhī lā 'khtilāf fīhi ᶜindanā"], while A-XN in that same example appears to exclude certain parts of the precept included in AMN.[4]

The most distinctive feature of Mālik's AMN appears to be that it indicates that the precept to which it refers is supported by Madīnan consensus [ijtimāᶜ]. The question

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[1]See below, pp. 719-720. [2]Below, pp. 725-726.

[3]Below, pp. 719-720, 726-727. [4]Below, pp. 707, 727.

that arises in the case of AMN, however, is that of whether or not the ijtimā^c referred to by AMN is qualitatively the same as that Madīnan local consensus referred to in terms like S-XN, AMN-X, and A-XN, which explicitly indicate a total consensus of the Madīnan fuqahā' by stating that there are no differences of opinion among them regarding the precepts to which these terms refer. It appears to me that the type of consensus referred to by AMN is that of a preponderant but not total consensus of the Madīnan fuqahā'. As indicated earlier, it is quite possible that the earliest conceptualization of 'ijmā^c in the Muslim community was that of a preponderant, majority consensus and that the idea that the only type of 'ijmā^c which deserved the name was one which consisted of the total consensus of the 'ummah or of the fuqahā' of the 'ummah was a later development.[1] The example referred to earlier in which AMN includes A-XN--which stands for a total consensus of the Madīnan fuqahā'--while A-XN excludes parts of the AMN which had constituted points of difference among some of the prominent early fuqahā' supports my hypothesis that AMN does not stand for the same quality of local consensus as indicated by A-XN and similar terms which stand for total consensus.[2] Similarly, I have found evidence in my analysis of Mālik's AMN precepts, although not always conclusive, which indicates that there had been some

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[1]See above, pp. 195-204. [2]See below, pp. 707, 727.

differences among Madīnan fuqahā' regarding AMN precepts.[1] Ash-Shāfi^{c}ī singles out the terms AMN and AN as not actually indicating a consensus of the Madīnan ^{c}ulamā', and, as I have pointed out, it is a total consensus which ash-Shāfi^{c}ī has in mind.[2] It must also be pointed out, however, that the hypothesis that AMN does not stand for a total consensus of the Madīnan fuqahā' is contrary to the definition of AMN attributed to Mālik in the report of Ibn 'Abī 'Uwais.[3]

One of the most distinctive characteristics of Mālik's terminology, according to my analysis of it, is the indication it gives of whether or not precepts were supported by Madīnan local consensus and--as in the case of the term AMN--the indication it gives of the quality of that consensus, i.e., whether it was preponderant or total. This purpose of indicating the relationship of ^{c}amal precepts with Madīnan local consensus is clearly one of the primary concerns of Mālik's terminology and distinguishes it, as I have indicated, from the classifications of ^{c}amal of the later legal theorists whom I have studied. One of the conclusions I have reached as a result of my analysis of Mālik's terminology is that there was a difference between Madīnan ^{c}amal and Madīnan local consensus. Madīnan ^{c}amal is the broadly inclusive cat-

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[1]See below, pp. 723-725.

[2]See above, pp. 195-196, 201-202, 343-347.

[3]See below, pp. 540-541, 543.

egory in this regard, for it includes both precepts which were supported by local consensus and precepts which were not. On the other hand, while every instance of Madīnan local consensus was also an instance of Madīnan ᶜamal, many ᶜamal precepts were not supported by local consensus.

As indicated in my analysis of the letter of al-Laith ibn Saᶜd to Mālik, al-Laith appears to draw this distinction between Madīnan ᶜamal, generally speaking, and Madīnan local consensus. Al-Laith describes himself in that letter as the most adamant person he knows in following Madīnan local consensus and as one who is very averse to following irregular [shādhdh] legal opinions. At the same time, al-Laith feels at liberty to disagree with those types of ᶜamal regarding which Madīnan fuqahā' themselves have disagreed, and he feels justified in such cases, furthermore, to follow the contrary ᶜamal of his own country or of other regions, as long as that ᶜamal was instituted by the Companions and during the days of the Madīnan caliphate.[1] Al-Laith obviously draws a distinction, then, between Madīnan consensus and Madīnan ᶜamal not supported by consensus. Indeed, Mālik has written to him because of his disagreement with certain types of Madīnan ᶜamal, and among those types of ᶜamal with which al-Laith has disagreed is the precept regarding handing down legal judgments on the basis of the oath of the plaintiff support-

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[1]See above, pp. 312-313, 322-323.

ed by the testimony of a single witness. Mālik refers to this precept in the Muwaṭṭa' as a MḍS ["maḍat as-sunnah"; the sunnah (which) has been put into practice], a term which--like AN, SN ["as-sunnah ᶜindanā"], and S ["as-sunnah"]--gives no specific indication of Madīnan local consensus. Furthermore, as I have indicated in my analysis of this precept, there is evidence that the prominent Madīnan fuqahā' ᶜUrwah ibn az-Zubair and az-Zuhrī had taken issue with it.[1]

The term AN ["al-'amr ᶜindanā"] appears to fall in the category of those ᶜamal precepts that did not have the support of local consensus. This difference between AN and AMN is quite explicit in the first example of AN in the AN chapter. In that example, Mālik cites his opinion and the opinion of az-Zuhrī, which are identical to the AN, and he cites the contrary opinion of Saᶜīd ibn al-Musayyab, who was probably the most significant Madīnan faqīh in the generation of the older Successors. Mālik states further that there is no AMN in the matter.[2] I have found evidence of significant differences of opinion among the Madīnan fuqahā' for each of the AN's I analyzed except for one, for which I could not find pertinent information.[3] Similarly, I found evidence of such differences regarding two AN's mentioned elsewhere in my analysis.[4] I did not undertake a systematic analysis of other terms like MḍS, SN, and S, which like AN give no

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[1]See above, p. 329, and below, pp. 572-573.

[2]Below, pp. 734-735. [3]Below, p. 756.

[4]Below, pp. 668-669, 720.

explicit indication of Madīnan local consensus. As mentioned earlier, however, there is evidence of significant differences of opinion in Madīnah regarding a MdS precept which I analyzed, and I also found evidence of a difference of opinion from Sa^{c}īd ibn al-Musayyab regarding a S precept which Mālik sets forth in one of the ^{c}amal chapters.[1]

In the report attributed to Mālik and transmitted by Ibn 'Abī 'Uwais, AN is defined as being Madīnan ^{c}amal. The report states further that AN precepts constitute the precepts in terms of which the rulings of the Madīnan judiciary are handed down. It states further that such precepts are known by the ignorant and knowledgeable alike, and no indication is given in the report that AN precepts were supported by Madīnan local consensus.[2] According to a report in the Mudawwanah, az-Zuhrī refers to an AN precept pertaining to the rights of the wife in marriage as that in accordance with which the judges of Madīnah hand down their rulings, which he repeats twice.[3] Similarly, many of the AN precepts in the Muwaṭṭa' which I analyzed are of such nature that they would have come directly under the jurisdiction of the Madīnan judiciary or some other form of executive authority--such as that of the 'amīr or muḥtasib.[4]

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[1]See below, pp. 665-666, and pp. 572-573.

[2]See below, p. 732. [3]See below, p. 733.

[4]See below, pp. 732-733, 666-667, 676-677, 737, 740-741, 742, 745.

This relationship between AN and executive authority--be it that of the judiciary, the office of the 'amīr, or other executive functions in the city--is significant, I believe, because it accounts for how there could have been uniform ᶜamal in Madīnah regarding matters about which the prominent Madīnan fuqahā' were divided. Whenever supported by executive authority, AN precepts would become widespread and well-known to the ignorant and knowledgeable alike, despite the fact that there were dissenting opinions.

Nevertheless, there are many AN precepts in the Muwaṭṭa' which would not have come under the jurisdiction of the judiciary or other forms of executive authority, for that matter. Illustrations of such types of AN's are those, for example, which pertain to voluntary acts of worship. In such cases, whatever uniformity of ᶜamal there was in Madīnah despite the dissenting opinions of prominent Madīnan fuqahā' would have had to have come about through some other means. Hence, I believe, that uniformity of ᶜamal in such AN precepts--if it existed at all--would have been the result of such factors as the social prestige of those prominent Madīnan fuqahā' who subscribed to the AN, practiced it themselves, and taught it to others. Otherwise, it can be expected that there would have been some diversity in the ᶜamal of the people of Madīnah regarding such matters. Some of them would have been likely to follow the opinions and practices of one of the groups of fuqahā', while others would have been likely

to follow the opinions and practices of other Madīnan fuqahā'. I have referred to such types of ᶜamal as "mixed ᶜamal", and I believe there are examples of it in the Muwaṭṭa'.[1] It is possible that in some cases--as, perhaps, in the case of the ᶜamal regarding how mash is done[2]--both varieties of the mixed ᶜamal were widespread, and it might have been difficult to determine which, if any, of them was predominant. In other cases, however, it is probable that one variety of a mixed ᶜamal was predominant in Madīnah, while the other variety was not--as, perhaps, was the case in the instance of the ᶜamal regarding whether or not one should recite anything when making ṣalāh behind the 'imām.[3] As some examples of AN in the Muwaṭṭa' have indicated, however, variety in Madīnan ᶜamal was also possible within the judicial tradition itself; thus the phenomenon of mixed ᶜamal quite conceivably pertained to some AN precepts, as well, which came under executive authority.[4]

Finally, in so far as the distinction between ᶜamal qadīm and ᶜamal muta'akhkhir in later legal theory is concerned, I have found evidence of no such distinction in Mālik's terminology. As mentioned before, it is often difficult to determine the source of Mālik's ᶜamal precepts, and in several

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[1]See below, pp. 654-655, 746-748; cf., 676-677, 738-739, 742.

[2]Below, pp. 654-655. [3]Below, pp. 746-748.

[4]See below, pp. 676-677, cf. pp. 738-739, 742.

examples the distinction drawn between ᶜamal naqlī and ᶜamal that resulted from ijtihād in the post-Prophetic period contains a considerable element of conjecture. Nevertheless, in those ᶜamal precepts which appear to have resulted from ijtihād, it has not generally been possible for me to date them and place them in either the category of ᶜamal qadīm or ᶜamal muta'akhkhir. The AMN precept about the permissibility of using the hunting dog of a Magian is a good example. Mālik supports its validity by setting forth an analogy; he does not, however, give any indication of who first drew that analogy or who was responsible for the ijtihād. I have found evidence to show that the Madīnan Companion Jābir ibn ᶜAbd-Allāh disagreed with this AMN. Nevertheless, one could not determine on that basis whether the precept was ᶜamal qadīm or later ᶜamal, for Jābir lived until the year 78/697, i.e. within two decades of Mālik's own birth, and, hence, one cannot date this AMN by reference to him.[1]

Similarly, Mālik reports in one of the ᶜamal chapters the amounts at which ᶜUmar ibn al-Khaṭṭāb set the indemnities in gold and silver for loss of life. Mālik states toward the end of that short chapter that it is the AMN that those who make use of camels in their livelihood are not given indemnities in gold and silver; those who make use of gold and silver in their livelihoods are not given indemnities in cam-

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[1]See below, pp. 694-695. For data on Jābir ibn ᶜAbd-Allāh, see below, p. 693, n. 3.

els; those who make use of silver in their livelihoods are not given indemnities in gold; and those who make use of gold are not given indemnities in silver. Again, the source of this stipulation is not clear. For, although Mālik makes it quite explicit that ᶜUmar ibn al-Khaṭṭāb set the amounts of the indemnities in gold and silver, there is no specific indication that he also stipulated this AMN.[1]

The ẋdIb precept ["wa ᶜalā hādhā 'adraktu 'ahl al-ᶜilm bi-baladinā"] that a wife may be separated from her husband if the husband fails to support her is another example of an ᶜamal precept which may have resulted from ijtihād but the source of which is difficult to identify. Mālik states in the Muwaṭṭa' that Saᶜīd ibn al-Musayyab held this opinion. If the precept had resulted from ijtihād, therefore, it would be possible that it had originated with the ijtihād of Ibn al-Musayyab. Reports in the Mudawwanah, however, indicate the ᶜUmar ibn ᶜAbd-al-ᶜAzīz implemented the precept, and, when he inquired about its validity, Saᶜīd ibn al-Musayyab sent word to him that it was the sunnah. There is some question, however, as I have indicated in my analysis of this precept, as to whether or not it actually went back to the Prophet. If, however, it did not, it would not be possible on the basis of the material I have found to determine whether it was an early or late Madīnan ᶜamal.[2]

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[1]See below, pp. 673-675.

[2]See below, pp. 604-605; cf., 700-702, 740.

The Difference between Madīnan ᶜAmal and Local Customs

In the context of the preceding classifications of Madīnan ᶜamal it is also appropriate to consider what the difference would have been in Mālik's mind between Madīnan ᶜamal and local customs [al-ᶜurf wa 'l-ᶜādah]. As indicated earlier, sound local customs have a high priority for Mālik and for the Mālikī school in general. According to 'Abū Zahrah, Mālik gives higher priority to local customs, in fact, than the 'imām's of any of the other major sunnī schools. The reason for this, 'Abū Zahrah believes, is because the concern for maṣlaḥah takes such a high priority in Mālik's thought, and--as ash-Shāṭibī suggests--there is generally a strong connection between sound local customs and the maṣāliḥ of the people of that locality.[1] In the preceding section, I also gave some examples of Mālik's application of local customs and suggested that he regarded them to be more authoritative than qiyās, as indicated by the fact that Mālik does istiḥsān on the basis of local customs, by means of which he overrules the strict dictates of qiyās.[2]

Ash-Shāṭibī holds that this priority which Mālik gives local customs is supported by the example of the Prophet, who took over many of the pre-Islamic customs of the Arabs. The policy of the Prophet, according to ash-Shāṭibī, was to abolish only those customs which were detrimental and to keep

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[1]See above, pp. 204-206. [2]See above, pp. 206-209.

and perfect those which were beneficial. For the beneficial customs of the pre-Islamic Arabs, ash-Shāṭibī believes, were especially well-suited for the environment and circumstances in which they were living.[1] It should be noted in addition to this, however, that in so far as Madīnan ᶜamal is concerned, it was primarily in the city of Madīnah that the Prophet accomplished this task of determining between which of the pre-Islamic customs of the Arabs he felt should be kept and which of them he felt should be abolished.

Thus, those pre-Islamic customs that remained part of the ᶜamal of the people of Madīnah in the Islamic era--such as customary methods of buying and selling, customary agricultural contracts, the custom of ᶜaqīqah, or the precept of qasāmah[2]--would have been regarded as legitimate types of ᶜamal by virtue of the Prophet's acceptance of them. Such types of ᶜamal, according to the classifications of later theorists, would not be regarded merely as local customs but rather as authorized parts of Madīnan ᶜamal naqlī. For, although they had not originated with the Prophet, they would be regarded as coming under the aegis of his sunnah by virtue of his having given them explicit or tacit approval ['iqrār].[3]

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[1]See above, pp. 205-206.

[2]See below, pp. 615-618, 618-623, 668-673, 713-723.

[3]See above, pp. 410, 412.

Therefore, although sound local customs are regarded to have considerable priority in Mālikī fiqh, those pre-Islamic customs of the Arabs which had come to be incorporated into the ᶜamal of Madīnah would have been regarded to have even greater authority. For if the assessments of 'Abū Zahrah and ash-Shāṭibī are accurate, the priority of non-Madīnan local customs (or for that matter Madīnan local customs which might have grown up in the post-Prophetic period) was a function of the maṣlaḥah which they contained for the people, and determining the extent of that maṣlaḥah would necessarily require personal judgment on the part of the fuqahā'. In the case of those pre-Islamic customs which had become part of Madīnan ᶜamal naqlī, however, such personal judgments would not have played a role, for such types of ᶜamal, from the standpoint of Mālikī legal theory, stood by virtue of Prophetic authority.

Theoretical Uses and Implications of Madīnan ᶜAmal

ᶜAmal As Normative Standard

ᶜAmal is the description of a society's behavior, not that of an individual. Thus, normativeness is at the very root of ᶜamal. A matter which is the ᶜamal of a people is also something which is normative for that people. In his treatment of ᶜamal in Al-Muwāfaqāt, ash-Shāṭibī focuses upon this normativeness of Madīnan ᶜamal, which he believes to be its most important characteristic as a source of Islamic law.

For Madīnan ᶜamal from the standpoint of Mālikī legal theory represents the ideal standard for the normative behavior of an Islamic society, on the premise that the Prophet authorized and instituted the ᶜamal of Madīnah and that its spirit and content were faithfully preserved, expanded upon, and handed down from father to son until the lifetime of Mālik.

This normative Madīnan ᶜamal which the Prophet established was, according to the Mālikī point of view, an ᶜamal which was properly balanced. It was not too harsh and demanding, so as to create a repugnance in the people toward the basic demands which it made upon them, and it was not too lax, such that the people might incline toward moral laxity and social decadence. It made all of the fundamental requirements of Islam upon the Madīnan society but with as little formality and with as much simplicity and ease as possible.[1] According to ash-Shāṭibī, as the following discussion will show, the ideal behavior which the Prophet set down for the Islamic community, as a community, is reflected in the widespread, predominant ᶜamal of Madīnah in the early generations but is not always reflected clearly in ḥadīth and other textual sources of law, which often do not draw the distinction clearly between the Prophet's normative and non-normative behavior.

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[1]For ash-Shāṭibī's development of these concepts and his citation of examples from the ḥadīth of the Prophet and āthār of the Companions, see Al-Muwāfaqāt, 3:60-76, 4:233-243.

One of the most prominent elements in pre-Islamic Arab culture, according to ash-Shāṭibī, was that of mimesis--the attribute of imitating one's elders and forefathers and adhering closely to their example--which the Prophet was able to use to the benefit of his religion by making himself the new standard of mimesis for his followers.[1] Because the Prophet was the model of behavior for those around him who were his followers, ash-Shāṭibī holds, he was careful to set an example in his public behavior which he felt would constitute a good norm for the people as a whole to live by. Therefore, there was a marked difference in some regards between the Prophet's public and private examples. His public example was intended to be normative, i.e., to become the ᶜ<u>amal</u> of the people, while his private example was exceptional in some

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[1]Ash-Shāṭibī holds that this element of mimesis in Arab culture constituted initially one of the major obstacles which the Prophet faced in spreading Islam. For many of those whom he called to Islam justified their rejection of it, as the Qur'ān makes very clear, on the grounds that they could not forsake the way of their forefathers. This same element of mimesis, however, was reversed and brought into the service of Islam. To begin with, the Prophet Abraham was identified as the true forefather of the Arabs whose example they should imitate. It was made very clear that the polytheistic ways of the Arabs were a departure from the tradition of their father Abraham, while the newly emerging Islamic community, on the other hand, was identified as the embodiment of the Abrahamic tradition. Secondly, Islam emphasized greatly those pre-Islamic values which it regarded to be good and which the pre-Islamic Arabs also regarded highly and practiced following. Finally, the Prophet himself exemplified those traditional values as well as the new Islamic values he was teaching, which encouraged his followers to take him as their standard of imitation in accordance with Qur'ānic injunctions to that effect. Thus, ash-Shāṭibī concludes, the new standard of mimesis became the chief vehicle for removing the Arabs from their old standard. Ash-Shāṭibī, <u>Al-Muwāfaqāt</u>, 4:249.

ways. In matters of worship, for example, ash-Shāṭibī holds that the Prophet set two distinct examples. When he worshipped in public in the view of the people as their leader and exemplar, the Prophet set a moderate standard which was simple and easy to follow. But in his private life, when out of the view of the general public, the Prophet's worship was much more rigorous and time consuming. The Prophet, ash-Shāṭibī continues, was able to conduct such rigorous private worship and still meet the social obligations required of him. He intended, however, that his private example in worship not become the norm for Islamic society, because it would constitute a standard which would be too difficult for the average person to follow. Such a standard of worship would be beyond the interest and capacity of the common man or woman; hence, it would create a standard of religiosity which only a few could realize. Furthermore, few of those who could realize that standard would also be able to meet the social obligations normally required of them, in the manner which the Prophet had done.[1] 'Abū Zahrah, as mentioned earlier,

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[1]See ash-Shāṭibī, Al-Muwāfaqāt, 3:56-76; 4:239-243. It is on the basis of this concept of normative moderation in ᶜamal that ash-Shāṭibī makes a critique of some of the historical developments in ṣūfism. The extensive worship and asceticism which characterized some ṣūfīs, ash-Shāṭibī holds, should always remain informal, spontaneous, and essentially within the domain of private life and purely voluntary observance. He regards the public expression of ṣūfism in formally organized and structured movements as having endangered Islamic society by breaking down the distinction between moderate, normative worship, as exemplified in the Prophet's public example, and the rigorous and time consum-

holds that concern for the maṣāliḥ of society is one of the foremost concerns in Mālik's thought and Mālikī legal theory.[1] According to the preceding Mālikī interpretation of the nature and inception of Madīnan ᶜamal, the creation and maintenance of a properly balanced Islamic ᶜamal is clearly a vital maṣlaḥah in the life of the Muslim community and, hence, one of the primary goals in the ultimate purposes of the sharīᶜah [maqāṣid ash-sharīᶜah].

Thus, although the Prophet encouraged his followers to pray additional prayers [an-nawāfil] in conjunction with the required daily prayers, he directed that such optional prayers not be prayed in congregation after the manner of required prayers, for fear that they would become customary and cease to be optional. The Prophet also indicated to the people that it was better for them to pray supererogatory prayers in their homes rather than in the mosque. Nevertheless, ash-Shāṭibī points out, the Prophet, according to some ḥadīth, is reported to have prayed some nawāfil prayers in small congregations in the privacy of the homes of some of his close Companions. In this case, according to ash-Shāṭibī, the Proph-

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spiritual exercises of the Prophet, some of his Companions, and the early generations of Muslims, which were intentionally restricted to the seclusion of their private lives. It also obscured the concept which the Prophet had made quite explicit in his teachings, namely, that extensive worship was praiseworthy only as long as it did not stand in the way of one's meeting normal social obligations. See ibid., 4:239-243.

[1]See above, pp. 269, 205; 83.

et's directives that nawāfil prayers are not to be prayed in congregation and that such prayers are preferably prayed at home constitute the desired norm. Ash-Shāṭibī, who regards the contrary reports about the Prophet's having prayed in small congregations in the homes of some of his close Companions to be authentic, does not regard these reports as contradicting the above precepts but rather as reflecting non-normative private behavior, which was intended not to become ᶜamal. In this particular case, therefore, it was not the purpose of the above directives, according to ash-Shāṭibī, which the Prophet intended to be normative for the community that they prohibit the praying of nawāfil prayers in congregation absolutely, for that act is not evil in itself. Rather, the prohibition in that instance was an example of sadd adh-dharāiᶜ,[1] as it were, which banned the praying of nawāfil prayers in public or in large groups because of the danger that such practices would become normative for the community, i.e., become their ᶜamal. Thus, there would be no harm in praying nawāfil prayers in small congregations privately, as the Prophet is reported to have done. This, ash-Shāṭibī continues, was Mālik's understanding of the matter. Mālik is reported to have said that it is permissible to pray nawāfil prayers in congregations of around two or three persons in private or wherever there is no danger of notoriety [ishtihār]. Mālik

[1]See above, pp. 262-267.

regards it as reprehensible [makrūh], however, that nawāfil prayers be prayed in congregations under circumstances that would be likely to create notoriety.[1]

In addition to this distinction between the normative public example and the private example of the Prophet which, in some matters, was not intended to be normative for the community, ash-Shāṭibī indicates that there are also numerous public acts of the Prophet which were non-normative for various reasons. Here again, as shall be discussed in greater detail later, ḥadīth often make no clear distinction in such cases between reports of normative or exceptional behavior.[2]

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:62-63. Ash-Shāṭibī cites other examples to support this distinction between normative public behavior and private behavior not intended to be normative for the community. He points out, for example, that in a ḥadīth transmitted by Muslim and al-Bukhārī, ᶜĀ'ishah reports that the Prophet used not to pray ṣalāt aḍ-ḍuḥā [a supererogatory prayer prayed in the early morning after sunrise] despite the fact that he had a great desire to do so, because he feared that the people would make it their ᶜamal also if he did so. (It might be noted that in desert society the early morning was a time of much activity and public exposure for the Prophet before the heat of the midday.) Similarly, the Prophet is reported to have directed the people not to continue fasting for more than one day in a row without breaking fast and eating and drinking in between [i.e., he prohibited al-wiṣāl]. He continued to perform wiṣāl himself, however, because, as he is reported to have said, God gave him the strength to fast in that manner and still have the energy to perform normal activities. Some of the Companions, ash-Shāṭibī states, who also had the strength to pursue normal activities while performing wiṣāl continued to perform it, because they understood that the Prophet's prohibition of wiṣāl did not apply to themselves but to the generality of the people upon whom wiṣāl was too demanding. See ash-Shāṭibī, Al-Muwāfaqāt, 3:60-63.

[2]It might be pointed out that the ḥadīth that most frequently fail to make such distinctions clearly are those which report isolated actions. As mentioned earlier, such reports are regarded to be ambiguous in Mālikī legal theory until they

And again it is the ᶜamal of Madīnah during the first generations which is regarded to be the proper reference in Mālikī legal theory to determine which of such reports are normative and which of them are not.

As an illustration of such a non-normative public act of the Prophet, ash-Shāṭibī cites reports--again the authenticity of which he does not question--which state that the Prophet once stood up to meet his cousin Jaᶜfar ibn 'Abī Ṭālib[1] and, according to another report, that he once stood up for Saᶜd ibn Muᶜādh.[2] These reports are contrary to the

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are placed in the context of ancillary legal references; see above, pp.188-195 . In the cases of so many reports of isolated actions and incidents, one cannot determine on the basis of the material cited in the text whether what happened was normative or exceptional, common or irregular, whether it happened only once or a thousand times.

[1]JAᶜFAR ibn 'Abī Ṭālib ibn ᶜAbd-al-Muṭṭalib ibn Hāshim (d. 8/629) was the older brother of ᶜAlī by about ten years, and,like ᶜAlī, Jaᶜfar became a Muslim very early. He played an important role in the first hijrah [emigration], which was to Ethiopia. For most of those who went were the poor and socially dispossessed who could find no protection in the tribal system of Makkah because of their low social status and who could take refuge in Ethiopia; Jaᶜfar was one of the prominent members of Quraish who, like ᶜUthmān ibn ᶜAffān, accompanied them to Ethiopia as leaders and spokesmen in the new land. Jaᶜfar remained in Ethiopia several years after the hijrah to Madīnah and is reported to have come to Madīnah in the year 7/628, at about the time of the siege of Khaibar. Jaᶜfar died during the next year while fighting on a battlefield in one of the Syrian campaigns; hence, he died during the Prophet's lifetime. Ziriklī, 2:118.

[2]SAᶜD IBN MUᶜĀDH ibn an-Nuᶜmān ibn Imri' al-Qais (d. 5/626) was one of the most prominent Companions from the 'Anṣār and was a leader of the Madīnan tribe al-'Aws. Saᶜd is reported to have been unusually large, tall, and strong. He became renowned for his courageous feats on the battlefields of Badr and 'Uḥud. He was wounded by an arrow during the siege of the Trench [al-Khandaq] and died from the wound days

ᶜamal that one does not stand up to honor another, which was an explicit teaching of the Prophet and something which he prohibited his Companions from doing in his presence in honor of him. The acts reported in these ḥadīth are, however, not negations of that ᶜamal or principle, even though they might appear to be so when isolated from their historical context. They can be accounted for in several ways; in the case of Jaᶜfar, for example, ash-Shāṭibī states that Jaᶜfar was arriving in Madīnah after years of absence from the Prophet during the Ethiopian emigration. Under such circumstances it would have been unusual if the Prophet had not stood up for him and come forward to embrace him--which is also part of the report and was contrary to ᶜamal.[1]

Similarly, ash-Shāṭibī reasons, it is sometimes misleading to generalize on the basis of isolated instances of the Prophet's not having objected to certain mistaken or objectional types of behavior which took place around him or were brought to his attention and to conclude that the Prophet had

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afterward. Saᶜd is said to have been thirty-seven at the time of his death; according to one report, the Prophet told his Companions after Saᶜd's death that the throne of God had shaken at the death of Saᶜd ibn Muᶜādh. Ziriklī, 3:139.

[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:64. Ash-Shāṭibī gives other instances of contrary, non-normative reports of public behavior or statements, such as the Prophet's having reportedly wiped over his turban once while performing wuḍū', which may have been because he was sick. Similarly, ash-Shāṭibī cites the example of the Prophet's having given the people the command one ᶜīd that they not store away the meat of the sacrificial animals but distribute it to the poor, which, as the Prophet later explained, was because of an impoverished clan that was passing through Madīnah at that time; see ibid., 3:64-67.

given those acts his tacit approval ['iqrār] merely because he did not say anything. It may have been the case in some such instances that the Prophet felt it more appropriate not to correct the person immediately, if, for example, the person's behavior had simply been an oversight or a lapse into error which that person would correct on his own. In some cases of mistaken behavior, ash-Shāṭibī continues, the person may not have known it was mistaken at the time he did it but have come to realize that later, and, since the person did not repeat it, the occasion did not arise again for the Prophet to correct it.[1] Although ash-Shāṭibī does not make the point himself, it might be pointed out here that, in terms of legal theory, the presumption of explicit or tacit approval ['iqrār] in the third category of ᶜamal naqlī[2] is qualitatively different from the presumption of tacit approval in isolated instances, such as ash-Shāṭibī has referred to here. For in the case of ᶜamal naqlī, such customs of the people are normative and of the nature of ᶜumūm al-balwā.[3] Hence, it is not probable that such acts would have escaped the Prophet's attention during his more than a decade in Madīnah, nor would the occasions of such acts have recurred so infrequently that the Prophet would not have found it appropriate to object to them if he had felt they were wrong.

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:67-68.

[2]See above, pp. 410-415.

[3]See above, pp. 184-188; below, pp. 481-484.

As mentioned earlier in the discussion on the ambiguity of isolated actions, ash-Shāṭibī holds that certain types of statements--such as isolated parts of conversation, situational dialogue, and so forth--are potentially just as ambiguous when isolated from other references as reports of isolated actions. In fact, ash-Shāṭibī holds that ambiguous statements of this nature should be classified with reports of isolated actions.[1] Similarly, ash-Shāṭibī points out, there are reports of statements of the Prophet that were not intended to be the basis of normative legal precepts and which may appear to contradict other statements of the Prophet that pertain to ᶜamal precepts. Ash-Shāṭibī cites the example of the Prophet's statement, "Pray the dawn prayer at the break of dawn" ["'asfirū bi-'l-fajr"], which reflects the ᶜamal of the people of Madīnah, namely, of performing the dawn prayer in the early dawn while it is still dark.[2] According to another ḥadīth, however, which ash-Shāṭibī believes to be authentic, the Prophet said, "Whoever prays one rakᶜah [prayer unit] of the dawn prayer before the sun rises has made the dawn prayer," which might appear to be contradictory to ᶜamal.[3]

This second ḥadīth, according to ash-Shāṭibī, is not normative, in the sense that no legal implications were intend-

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[1]See above, pp. 189-190. [2]Cf. Mudawwanah, 1:61 (5).

[3]Ash-Shāṭibī, Al-Muwāfaqāt, 3:58-59.

ed by it which would negate the normative ᶜamal of praying the dawn prayer early. Rather, ash-Shāṭibī states, this ḥadīth had the purpose only of designating the limits of the period during which the dawn prayer could be prayed and still be valid. It was not, however, intended to reflect a desired norm of praying the dawn prayer late.[1] Perhaps, ash-Shāṭibī's thinking can be made clearer by reference to a contemporary similitude. A teacher, for example, would urge his students to make A's or B's, while at the same time informing them that whoever makes a D will have passed. He desires to see the normative achievement of his students, however, in the direction of A's and B's, not D's, and the teacher's statement that D is a passing mark is not intended to indicate to the students that it would be desirable for them to make D's or that it would even be acceptable if their normative achievement were in the direction of D's.

In the preceding texts which ash-Shāṭibī has cited as examples one is able to discern the difference between what was intended to be normative and what was not, on the basis of the indications contained in the texts. Ash-Shāṭibī has chosen these examples, in fact, because they help to make clear that there was a distinction between normative and non-normative behavior in early Islamic society--as, for that matter, in each society in its own way. But in many le-

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:58-59.

gal texts the determination of whether what is reflected in the text is normative or not cannot be made on the basis of the information contained in the text alone. Therefore, ash-Shāṭibī concludes, in accordance with Mālikī legal theory, that the normative ᶜamal of Madīnah is a standard reference upon which the faqīh can rely in attempting to make that and similar determinations about legal texts:

> . . . For whenever a mujtahid contemplates a legal statement pertaining to a matter, he is required to look into many things, without which it would be unsound to put that statement into practice. Consideration of the types of ᶜamal of the early generations removes these ambiguities from the statement decisively. It renders distinct that which is abrogating from that which has been abrogated; it provides a clarification for that which is ambiguous, and so forth. Thus, it is an immense help in the process of doing ijtihād. It is for that reason that Mālik ibn 'Anas and those who hold to his opinion have relied upon it.[1]

The Obligations of the ᶜUlamā' with Regard to Normative ᶜAmal

The Prophet's concern for the maintenance of a moderate, properly balanced ᶜamal which would accomodate the society as a whole--men and women, the weak and the strong, the young and the old--while directing the people to set more rigorous standards for themselves in their private lives, if they desired, is reflected in the following ḥadīth, which Mālik cites in the Muwaṭṭa':

> When any of you leads the people in prayer, let him go easy ["fa-l-yukhaffif"]. For there are among them

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:76; for earlier reference to this quote, see above, p.178.

> the weak and the sick and the old. But when anyone of you prays alone, let him lengthen his prayer as long as he desires.[1]

According to ash-Shāṭibī, the Prophet was careful to set such a normative example for the people, which his Companions learned to do from him likewise. Because of the importance of establishing and preserving a properly balanced, normative ᶜamal, ash-Shāṭibī holds that it has become obligatory upon the ᶜulamā' and others whose examples are imitated by the people to do likewise. On the other hand, for such prominent persons in society to set non-normative examples is impermissible by virtue of the principle of sadd adh-dharā'iᶜ,[2] since it is possible that setting such a non-normative example for the public will lead to the distortion of ᶜamal:

> For it is likely that the ignorant, when they see an ᶜālim persistently doing a thing, will conclude that it is obligatory, and sadd adh-dharā'iᶜ is something which the law demands [in such cases] and is one of the definitive [qaṭᶜīyah] principles of [Islamic] law.[3]

The ᶜālim, ash-Shāṭibī holds, must pattern the example he sets according to the ᶜamal of the first generations of Islam, and he must take great care not to make normative those types of behavior which the first generations persistently left as private, exceptional, or otherwise non-normative.[4]

In the following 'athar, which Mālik cites in the Mu-

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[1]Muwaṭṭa', 1:134. [2]See above, pp. 262-267.

[3]Ash-Shāṭibī, Al-Muwāfaqāt, 3:61-62. [4]Ibid., 3:70-71.

wattā', ᶜUmar ibn al-Khaṭṭāb is shown as having endeavored to set a normative example which would be within the capacity of the people to follow. According to this report, ᶜUmar ibn al-Khaṭṭāb once rode out at the head of a party of horsemen [rakb] which included ᶜAmr ibn al-ᶜĀṣ.[1] That night they set up camp not far from an oasis. ᶜUmar ibn al-Khaṭṭāb awoke before the break of dawn and found that he had had an erotic dream and that the seminal emission had soiled his clothing, which (according to Islamic law) he would have to clean before being able to pray the dawn prayer in them. There was not enough water in the camp, however, for ᶜUmar to wash his clothing. He aroused the men, and they moved on to the oasis. Once there ᶜUmar ibn al-Khaṭṭāb set about washing his clothing in the dark, but he was still washing by the time the first light of dawn appeared and the time for prayer came. ᶜAmr ibn al-ᶜĀṣ said to him, "Dawn has overtaken you; we have other garments with us, so put yours aside and let them be washed." According to the 'athar, ᶜUmar replied, "How strange of you, ᶜAmr ibn al-ᶜĀṣ! Even if you can find other garments, will all the people be able to?

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[1]ᶜAMR IBN AL-ᶜĀṢ ibn Wā'il as-Sahmī (50 bh-43/574-664) later became renowned as the conqueror of Egypt. He was among the opponents of Islam until after the Treaty of al-Ḥudaibīyah, when he and Khālid ibn al-Walīd, another great conqueror, became Muslims and joined the Muslim forces. The Prophet made ᶜAmr ibn al-ᶜĀṣ one of his military commanders, and the caliphs 'Abū Bakr and ᶜUmar kept him in that position. Prior to the conquest of Egypt, ᶜAmr played an important role in the conquest of Greater Syria and Palestine. He ruled as governor of Palestine for a time and then Egypt, but was removed by the caliph ᶜUthmān. Ziriklī, 5:248-249.

By God, if I were to do [as you suggest], it would become a sunnah. I will wash what I can see instead, and sprinkle water over what I cannot see."[1]

In his commentary on this 'athar, Ibn ᶜAbd-al-Barr states that, because ᶜUmar ibn al-Khaṭṭāb was aware of how closely the people imitated his example, he wanted to set for them an example which they could follow easily and without undue difficulty.[2] Thus, although for him it would have been much easier just to change his clothes, he chose to wash them instead as best as he could under the circumstances, since most of the people did not possess extra clothing into which they could change. It might also be pointed out that this 'athar indicates how people looked to the examples of Companions of the stature of ᶜUmar ibn al-Khaṭṭāb as indications of the content of sunnah, which is the same principle which is used in the Mālikī, Ḥanafī, and Ḥanbalī schools.[3] According to this report, ᶜUmar was well aware that they did so and acted accordingly.

Ash-Shāṭibī praises Mālik for having been careful to set a normative example in his own public life, (to be a carrier of ᶜamal as it were[4]). He cites a report according to

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[1]Muwaṭṭa', 1:50. [2]Ibn ᶜAbd-al-Barr, Istidhkār, 1:361.

[3]See above, pp. 161-169.

[4]See above, pp.403-409.

which Mālik used to say that one is not truly an ᶜālim until one requires of oneself in private matters and acts of voluntary worship what one would not recommend the people in general to do and in which there would be no harm if one did not do it oneself.[1] If such reports about Mālik are authentic they would be a further indication, as I suggested earlier, that Mālik probably looked to the prominent Madīnan ᶜulamā' as the carriers of ᶜamal and that he regarded it as a legacy and duty of them to maintain and protect the content of Madīnan ᶜamal.[2] Similarly, Ibn al-Qāsim gives examples in the Mudawwanah of various optional matters of worship which Mālik preferred to do in his private life ["fī khāṣṣat nafsihī"] but which Mālik would not direct the people to do.[3]

Elsewhere, ash-Shāṭibī emphasizes again the obligations of the ᶜulamā' to establish and preserve a properly balanced ᶜamal for the people, which will not be so tedious or demanding as to make religious observance and compliance repulsive to them nor so lax as to bring about decay and social decadence. This standard of moderation, because it is such a fundamental maṣlaḥah, must be continually in the mind of the mujtahid or muftī [one who gives legal opinions] as he attempts to apply the law to new and changing circumstances:

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 4:242.

[2]See above, pp. 403-409. [3]Mudawwanah, 1:120 (4); 1:121(11).

> The muftī who has attained the highest calibre is he who takes the people along the well-known path of moderation [al-maᶜhūd al-wasaṭ] in those matters which pertain to the general public [al-jumhūr]. He neither constrains them to follow a policy that is severe [madhhab ash-shiddah] nor does he let them incline toward the direction of dissolution [al-inḥilāl].[1]

The Historical Concern of the ᶜUlamā' about Irregular Opinions

In conjunction with ash-Shāṭibī's concept of the normativeness of ᶜamal, one should note by way of comparison the concern of many of the prominent fuqahā' of Mālik's generation and earlier about erratic and irregular [shādhdh] deductions, opinions, and rulings. As mentioned earlier, the very notion of irregularity, to which these fuqahā' have directed their attention, implies that they possessed normative standards which served for them as a criterion by which to distinguish between that which is regular or normative and that which is non-normative and irregular.[2]

In his response to the letter of Mālik, for example, al-Laith ibn Saᶜd emphasizes how averse he is to following that which is erratic and irregular [shādhdh]. One must bear in mind, furthermore, that al-Laith emphasizes this point in the context of justifying to Mālik the fact that al-Laith has departed from certain Madīnan ᶜamal precepts not supported by local consensus and that he has chosen to follow instead

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 4:239.

[2]See above, p. 179.

the well-established ᶜamal of other regions in those cases. Thus, it appears to me that al-Laith recognizes the fact that Mālik will perceive his departures from Madīnan ᶜamal as shādhdh; al-Laith wants to defend himself against such an allegation and assure Mālik that what he has done is not to be regarded as shādhdh. One can infer from this that both Mālik and al-Laith ibn Saᶜd regarded departures from the normative to the irregular and non-normative to be unsound and blameworthy.

One of the main themes of Siyar al-'Awzāᶜī, of course, is this same aversion to that which is shādhdh. 'Abū Yūsuf warns repeatedly in that work that it is unsound to follow non-normative ḥadīth. As pointed out earlier, 'Abū Yūsuf accounts for the irregularity of many ḥadīth by questioning their authenticity; at the same time, however, he acknowledges that there are ḥadīth which are authentic yet irregular in their implications, nevertheless:

> . . . But the ḥadīth of God's Messenger have [diverse] meanings, implications, and interpretations, which only one whom God helps to that end can understand and perceive.[2]

'Abū Yūsuf, of course, does not recognize the ᶜamal of Madīnah as an acceptable normative standard by which to evaluate ḥadīth. Nevertheless, he has a normative standard of his own which clearly serves for him a function cognate to that which Madīnan ᶜamal serves for Mālik:

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[1]See above, p. 322. [2]See above, pp. 176, 175.

> Make the Qur'ān and the well-known sunnah [as-sunnah al-maᶜrūfah] your directing guide. Follow that and judge on the basis of it ["wa qis ᶜalaihi;" lit., "do qiyās on the basis of it"] whatever presents itself to you that has not been clarified in the Qur'ān and sunnah.[1]

And elsewhere:

> Beware of irregular [shādhdh] ḥadīth and take care to follow those ḥadīth which the community [al-jamāᶜah] is following, which the fuqahā' recognize [as valid], and which are in accordance with the Book [i.e., the Qur'ān] and the sunnah. Judge [qis] matters on that basis. . . .[2]

The parallel between 'Abū Yūsuf's reference to the community in this quotation and Mālik's reliance upon the ᶜamal of the Madīnan community is unmistakable, although 'Abū Yūsuf, of course, probably had the Kūfan community in mind and certainly not the Madīnan. It is also interesting to note how 'Abū Yūsuf directs one to look also to the fuqahā' as a reference for establishing the validity of the ᶜamal of the community; as discussed earlier, I believe that Mālik looked to the prominent Madīnan fuqahā' as the true carriers and guardians of Madīnan ᶜamal.[3]

As discussed earlier, the distinction between sunnah--which for 'Abū Yūsuf is clearly a normative concept--and ḥadīth is quite evident in these citations. Such a distinction seems to have been common in the early period, just as the rejection of isolated ḥadīth as an independent source of law was so frequently tied to the defense of the normative sunnah.

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[1]See above, p.174. [2]See above, p. 175.

[3]See above, pp.403-409; cf., pp. 448-453.

Ash-Shāfi^{c}ī, one of the most distinctive characteristics of whose legal theory was the acceptance of isolated ḥadīth with sound 'isnād's as an authoritative, independent source of law, notes in "Ikhtilāf Mālik" how averse the Madīnans were in general to following the implications of isolated ḥadīth [khabar al-infirād].[1] I cited earlier reports attributed to Madīnan fuqahā' prior to the generation of Mālik which demonstrate their caution about isolated ḥadīth and the priority which they gave to Madīnan ^{c}amal instead. One of the most explicit of these statements is that of Rabī^{c}ah, one of Mālik's primary teachers:

> "One thousand [transmitting] from one thousand" is preferable to me than "one [transmitting] from one", for "one [transmitting] from one" would tear the sunnah right out of our hands.[2]

The highly regarded second/eighth century muḥaddith ^{c}Abd-ar-Raḥmān ibn Mahdī, who, according to one of the reports attributed to him, was aware of this distinction between ḥadīth and sunnah, praised Mālik more highly than either Sufyān ath-Thawrī or al-'Awzā^{c}ī because he regarded Mālik to be an 'imām in both ḥadīth and sunnah, while he regarded the other two as excelling in only one of those fields of knowledge respectively.[3] And for Mālik it is quite clear that

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[1]See above, p. 354.

[2]See above, p.174; cf., pp.171-174 . Cf. also the statement of Ibn al-Qāsim in the Mudawwanah about ḥadīth which are contrary to ^{c}amal; above, pp. 179-181.

[3]See above, pp. 79-80 ; cf., pp. 76-79. For data on Ibn Mahdī, see p. 77, n. 4.

the concept of Prophetic sunnah--a concept which he sets forth, for example, in his letter to al-Laith ibn Sa^{c}d[1]--is not equivalent to the content and implications of isolated ḥadīth. Isolated ḥadīth for Mālik are strictly a dependent source of law, which, as made clear in the citation from Ibn al-Qāsim, are regarded as having valid legal implications when they are in conformity with the normative ^{c}amal of Madīnah and as being invalid when contrary to ^{c}amal--even though, as pointed out earlier--the Madīnans often do not question the authenticity of such ḥadīth.[2] Madīnan ^{c}amal is the primary source of normative sunnah for Mālik, and, since Mālik studies ḥadīth against the criterion of ^{c}amal, one might also say that he judges ḥadīth by reference to the sunnah, while he regards it as unsound to attempt to constitute the sunnah solely by reference to the textual source of ḥadīth.[3]

Mālik's attitude toward ḥadīth is reflected clearly in his biography, as I have indicated. He exercised great care, first of all, in selecting those from whom he received his ḥadīth. But even in so far as those ḥadīth are concerned which Mālik received from his teachers, Mālik, as ash-Shāfi-^{c}ī is reported to have said and as is supported by the reports of the numerous ḥadīth which Mālik refused to transmit, would put even them aside if he found something about them to be

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[1]See above, p. 320. [2]See above, pp. 179-181, 200-201.

[3]See above, pp. 79-80, 300, 339; below, pp. 578-579.

questionable or if he felt transmission of them would be detrimental. Such an attitude toward ḥadīth, which would be unthinkable to those who, like ash-Shāfiᶜī, came to regard even isolated ḥadīth as, perhaps, the most consequential source of law, indicates that the Madīnan tradition upon which Mālik relied was something which he regarded to be a more than sufficient source of knowledge of the sunnah and a much surer source, at that, than ḥadīth. Ḥadīth for Mālik were clearly secondary; hence, as 'Abū Zahrah suggests, when it came to the transmission of ḥadīth Mālik also relied upon the principle of maṣlaḥah, and not simply considerations of formal authenticity, in determining what should and should not be transmitted.[1] Indeed, Mālik looked upon the business of transmitting ḥadīth as something so serious that he is reported to have had muḥaddith's in Madīnah put in jail, as long as they refused to abide by similar standards.[2]

The Muwaṭṭa', as I have pointed out, is essentially an ᶜamal book, codifying and setting forth the basic precepts of law of the Madīnan school as reflected in their ᶜamal. The title of the work itself--"the much-trodden path"--is apparently a figurative reference to Madīnan ᶜamal, and that figure of speech carries in it the implications of normativeness, simplicity, and ease which seem to be basic to the con-

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[1]See above, p. 83 ; for Mālik's attitude toward ḥadīth, see pp. 76-85.

[2]See above, pp. 84-85.

cept of Madīnan ᶜamal and place it in opposition to that which is shādhdh, erratic and irregular or otherwise non-normative.[1]

The Concept of ᶜAmal and the Legal Status of Habitual vs. Isolated Acts

Early in Al-Muwāfaqāt,[2] ash-Shāṭibī discusses the difference between the legal status of habitual and isolated acts, and this discussion is pertinent to Mālik's concept of ᶜamal, since it accounts, I believe, for why Mālik is reported to have regarded certain acts of the Prophet, 'Abū Bakr, and ᶜUmar to have been makrūh [undesirable; reprehensible]. There is a qualitative difference, ash-Shāṭibī holds, between an identical act when it is done once or only rarely and when it is done repeatedly or as a matter of habit. That is, there is a qualitative difference between an act in terms of whether or not it is normative or non-normative behavior. For whatever the property of an act may be as an isolated act, that property becomes magnified, enrichened or exaggerated and distorted when the same act is repeated frequently. Smoking a single cigarette, for example, is relatively insignificant, while the habit of cigarette smoking places one's health and life in danger.

Although legal theorists speak of acts as falling in-

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[1]See above, pp. 104-106.

[2]Unless indicated otherwise, the main ideas of the following discussion come from ash-Shāṭibī, Al-Muwāfaqāt, 1:132-142.

to five main categories--wājib [obligatory], mandūb [recommended], mubāḥ [indifferent], makrūh [reprehensible], and ḥarām [prohibited]--any given act, according to ash-Shāṭibī, has in essence only one of three legal statuses from the standpoint of Islamic law. Either it is desirable that one do it [maṭlūb al-fiᶜl], it is desirable that one not do it [maṭlūb at-tark], or it is an indifferent matter regarding which one is at liberty to choose to do it or not to do it [mukhayyar fīhi].

Those acts which are described in Islamic legal theory as "wājib" and "mandūb" are, according to ash-Shāṭibī, maṭlūb al-fiᶜl in essence. Similarly, those acts which are described as "ḥarām" and "makrūh" are maṭlūb at-tark in essence. Yet, although wājib and mandūb acts are identical in essence, they differ in terms of their attendant consequences, i.e., in terms of the social and individual benefits which they bring. According to ash-Shāṭibī, the maṣlaḥah behind an act which has been designated as wājib is an absolute maṣlaḥah, which pertains to the absolute necessities [aḍ-ḍarūrīyāt] of man's well-being in this life and the next. The maṣlaḥah of those acts which are designated as mandūb, on the other hand, is of lesser consequence.

Therefore, ash-Shāṭibī continues, the legal consequences of failing to perform a wājib act are different than those of failing to perform a mandūb act. Failure to perform a wājib act a single time is considered a serious breech of

moral obligation, in Islamic law, and punishable by God, with possible legal consequences in society. Failure to perform a mandūb act a single time or from time to time, however, is not regarded to be a serious breech of moral obligation, because of the lesser maṣlaḥah contained in the mandūb act. Single or isolated failures to perform what is mandūb, therefore, are pardonable [ma^{c}fūw ^{c}anhu] in the eyes of Islamic law. Thus, ash-Shāṭibī continues, although wājib and mandūb acts are identical in essence before the fact, they have different legal consequences after the fact, and this is the fundamental difference between them.

Similarly, in the case of acts which are designated as ḥarām and makrūh, which are both maṭlūb at-tark in essence, according to ash-Shāṭibī, their legal consequences differ by virtue of the fact that commission of that which is ḥarām leads to absolute mafāsid [individual and social detriments] which destroy man's well-being in this life and the next. The mafsadah involved in the makrūh act, however, is of a lesser degree. Therefore, commission of that which is ḥarām, even a single time, is regarded to be transgression against God in the eyes of Islamic law and is punishable by God, with possible legal consequences in society. Single or isolated commissions of makrūh acts, however, are overlooked because of the significantly different degree of mafsadah which they contain.

Single or isolated commissions of makrūh acts and sin-

gle or isolated failures to perform mandūb acts are pardonable in Islamic law, according to ash-Shāṭibī, by virtue of the principle of rafᶜ al-ḥaraj--the principle of making things reasonably easy for the people by not placing excessive demands upon them.[1] For ash-Shāṭibī, implementation of the principle of rafᶜ al-ḥaraj involves one of the most essential maṣāliḥ of Islamic society, namely, that of not making such excessive or troublesome demands upon society as to make religion loathsome to them, while also not being so lax as to bring about moral decay and social decadence. (By comparison with ash-Shāṭibī's concept of the normative balance of ᶜamal, it is clear that he would have conceived of a moderate, properly balanced ᶜamal as being the concrete manifestation of the principle of rafᶜ al-ḥaraj.) Therefore, because the maṣlaḥah which comes from implementation of the principle of rafᶜ al-ḥaraj is so much greater than any maṣlaḥah which might be attained by obligating the people to perform mandūb acts or to put aside makrūh acts without exception, it follows quite logically that implementation of the principle of rafᶜ al-ḥaraj takes priority. Furthermore, violation of the principle of rafᶜ al-ḥaraj would bring about a mafsadah which would threaten the existence of the Islamic society, and, as indicated earlier, ash-Shāṭibī holds it to be a definitive

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[1]For further treatment of the principles of rafᶜ al-ḥaraj, which underlies Mālik's conception of istiḥsān, see above, pp. 245-261.

principle of Islamic law that whenever the mafsadah which results from a matter becomes greater than the maṣlaḥah which results from that matter, that matter must be prohibited.[1]

Nevertheless, ash-Shāṭibī continues, because mandūb acts embody maṣāliḥ for the well-being of the Islamic society in this life and the next they must not be abandoned altogether. Just as it is pardonable that they be omitted from time to time, it is also required that they be performed from time to time, and--because of the qualitatively different value of habitual acts--persistent, systematic failure to perform that which is mandūb is similar to failure to perform that which is wājib. Similarly, on the other hand, because makrūh acts contain mafāsid, they come to be of essentially the same quality as ḥarām acts when makrūh acts become persistent and habitual. Therefore, whereas it is pardonable that one do that which is makrūh in isolated cases, it is prohibited that makrūh acts be done habitually, i.e., that they become part of the normative ᶜamal of the individual or society.

This same pattern holds, according to ash-Shāṭibī, in evaluating the legal status of indifferent [mubāḥ] acts, which ash-Shāṭibī regards as being in essence within the category of al-mukhayyar fīhi, those acts concerning which one is at liberty to choose to do them or not to do them.

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[1]See above, pp. 262-263.

The status of being mubāḥ generally pertains, according to ash-Shāṭibī, only to the single or isolated act and is almost never absolute. For rarely does an act which is mubāḥ, i.e., mukhayyar fīhi, as a single or infrequent act remain neutral when it becomes a frequently, habitually, or persistently repeated act. On the contrary, as the isolated mubāḥ act ceases to be isolated and becomes more frequent it gravitates in the direction of its particular properties, and from the standpoint of Islamic law its legal status is determined in terms of the ultimate ends which that act serves. If, as a frequently repeated act, an individual mubāḥ act leads to a maṣlaḥah--such as the development of intellect, health, or general well-being--then that act has the legal status of a mandūb act when it becomes frequent or habitual. That is, it becomes something which it is desirable that one do , maṭlūb al-fiᶜl, and the degree of that desirability depends on the extent of the maṣlaḥah which the frequently repeated mubāḥ act contains, such that if that maṣlaḥah were especially great persistent performance of the mubāḥ act could have the value of the performance of a wājib act.

On the other hand, if the isolated mubāḥ act will lead to a mafsadah as a frequently repeated act--such as wasting time, dulling the intellect, jeopardizing one's health, or destroying one's general well-being--it becomes maṭlūb at-tark--i.e., of the same status of makrūh and ḥarām acts--when it becomes frequently repeated or habitual. Ultimate eval-

uation of the detrimental mubāḥ act under such circumstances would depend on such considerations as those of how great the mafsadah is to which it leads and how persistently the act is performed, i.e., how quickly it is moving toward that mafsadah. Thus, under some circumstances an act which would be mubāḥ as a single or isolated act would come to be of the same status as a ḥarām act, if it were repeated persistently. It might also be pointed out that, from the standpoint of ash-Shāṭibī's legal theory, it is even more important to the ultimate interests of society to preserve it from mafāsid--which is the chief function of the concept of sadd adh-dharā'i[c][1]--than it is to secure maṣāliḥ, although both matters are essential to the life of society and should be pursued simultaneously. Therefore, the priority of discouraging the frequent or persistent performance of detrimental mubāḥ acts would have a higher priority than the cultivation of healthy mubāḥ acts, although, of course, both should be done simultaneously.

Reports of isolated acts and
Mālik's concept of karāhiyah

As mentioned earlier ash-Shāfi[c]ī in "Ikhtilāf Mālik" takes issue with the Mālikīs because they have classified some reported actions of the Prophet and the caliphs 'Abū Bakr and [c]Umar ibn al-Khaṭṭāb as neutral or as reprehensible [mak-

[1]See above, pp. 188-195; 351-352.

rūh]. I also noted that in these instances the ḥadīth or āthār in question are reports of isolated actions, which, of course, are regarded to be ambiguous in Mālikī legal theory when they are taken out of context.[1] As mentioned at the beginning of the preceding discussion of ash-Shāṭibī's concept of the qualitative difference between habitual and isolated acts, I believe that this concept accounts for the Mālikī classification of these isolated acts of the Prophet and 'Abū Bakr and ᶜUmar as makrūh--to which ash-Shāfiᶜī has objected--and that there is a connection between the concept of the normativeness of ᶜamal and Mālik's concept of karāhiyah [reprehensibility], as reflected in these classifications.

The Mālikīs report that the Prophet once recited certain sūrah's [chapters of the Qur'ān] at ᶜīd prayers, but they regard the Prophet's selection of these sūrah's as a neutral matter, in the sense that the 'imām who leads ᶜīd prayers is at liberty to choose for himself which verses or sūrah's of the Qur'ān he deems it appropriate to recite. Ash-Shāfiᶜī disagrees, however, and states in "Ikhtilāf Mālik," "You ought to regard things that the Prophet has done as preferable [mustaḥabb] in all cases."[2]

Both the Mālikī and Shāfiᶜī positions regarding this reported action of the Prophet imply presumptions about the intent of the Prophet behind the act of selecting the partic-

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[1]See above, pp. 191-192. [2]See above, pp. 351-352.

ular sūrah's which he chose to recite that day. For as Ibn al-Ḥājib indicates in his treatment of the ambiguity of isolated actions, the determination that it is desirable to imitate an act which the Prophet is reported to have done involves assumptions about the Prophet's intention and purpose in originally performing that act, and until one has determined by reference to other sources of law what the Prophet's intent behind the act was--i.e., did he intend that it be imitated, did he regard it as recommended but not necessary that one imitate it, or did he do it with no intention of being imitated in it at all?--one cannot actually claim to be imitating the Prophet merely by virtue of doing the same act.[1]

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[1]See above, pp. 191-192. Al-Qarāfī develops a concept very cognate to this. He states that one must determine the social capacity [taṣarruf] in which the Prophet did things or made individual statements before one can draw legal conclusions from those statements and actions. Some of the capacities in which the Prophet functioned which al-Qarāfī identifies are the capacity of political leader ['imām], the capacity of universal lawgiver, the capacity of judge, and so forth. Depending on what the social capacity of the Prophet was in which he did a given act or made a given statement, that matter will often take on quite different legal implications. Al-Qarāfī gives illustrations: For example, the Prophet is reported to have said: "Whoever kills an enemy on the battlefield has a right to his armor." If one understands the Prophet as having made this statement in his historical capacity as the military leader of a given battle or campaign, it does not take on universal implications. Rather, it becomes a matter of policy or strategy which he took regarding that particular engagement, which, however, has been isolated from its historical context by a manner of transmission which did not report such essential details. If, however, one understands the Prophet as having made this statement in his capacity of universal lawgiver--out of the context of specific historical circumstances, as it were--the ḥadīth takes on much different implications. For it would then imply that for all times, under all circumstances the soldier in Islamic law should have

Imitation in this sense requires harmony between the outward form of the act [az-ẓāhir] and the meaning or purpose which that act was originally intended to have. Performance of the outward form of the act in a context or manner contrary to what was originally intended by the act would not constitute imitation but could even amount under certain circumstances to being a parody or caricature of the original act.

The quality and meaning of an act do not consist merely in the outward form [az-ẓāhir] of the act but, rather, in how that outward form was intended to relate to the context of circumstances in which it was performed. Thus, it may be that the Prophet selected the sūrah's which he recited that day because he deemed that selection to be superior to other selections in all future times and places, in which case it would clearly be mustaḥabb from the standpoint of Islamic law that future 'imām's at ᶜīd prayers make the same selection. It may also be, however, that some other motivation

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this and analogical rights. Al-Qarāfī mentions also the ḥadīth according to which the Prophet said that any person who brought lands under cultivation which had lain uncultivated and neglected had a right to that land. Again, one must determine whether or not this statement reflects administrative policy of the Prophet--i.e., his functioning in the capacity of head of state--which he saw fit to take in view of the historical circumstances of the time or whether he made the statement in his capacity of universal lawgiver and, therefore, out of the context of history, as it were. If the Prophet made this statement as part of his administrative policy, it would not carry universal implications. If, on the other hand, the Prophet made the statement in his capacity as universal lawgiver the statement would constitute a precept of Islamic law in all times and places. Cited from Shihāb-ad-Dīn al-Qarāfī, Al-'Iḥkām fī-'l-Farq bain al-Fatwā wa-'l-'Aḥkām, pp. 22 ff., by ᶜAlāl al-Fāsī, pp. 110-112.

was involved. He might, for example, have selected those sūrah's that day simply as a matter of personal preference or because he felt that they were most appropriate for the occasion, given the immediate needs and concerns of the Madīnan community on that day, in which case it is conceivable that he would have selected other sūrah's and verses from the Qur'ān had the circumstances of the community that day been different, or if, perhaps, he might have chosen to speak on a different topic.

When one states that an act is mustaḥabb [recommended; desirable] one has made a recommendation that that act be repeated frequently and, hence, that it be made a part of ᶜamal, for it is something the doing of which is praiseworthy. Thus, ash-Shāfiᶜī's categorical statement in this example that every reported action of the Prophet must be regarded as being mustaḥabb--without making the reservation that one must first determine the special properties of that act and the circumstances in which it was done--runs contrary to the distinction between the normative and non-normative which, according to ash-Shāṭibī, it is one of the purposes of a well-balanced, normative ᶜamal to maintain. Such a categorical principle does not take sufficient account of the fact that, as a person acting in history, the Prophet's behavior would have had both exceptional, non-normative, and normative aspects and that it would be a distortion of the example he set to recommend that those of his acts be taken as desired norms which were

originally not normative.

Ash-Shāfi^{c}ī states in "Ikhtilāf Mālik" that the Mālikīs have transmitted a report which states that the Prophet once recited two very long sūrah's while leading the evening [maghrib] prayer. He states also that they have reported that 'Abū Bakr and ^{c}Umar ibn al-Khaṭṭāb are reported to have recited on separate occasions during their caliphates some of the longest sūrah's in the Qur'ān, while leading the people in the dawn [fajr] prayer. In the case of 'Abū Bakr, for example, it is reported that on that occasion they began the dawn prayer very early when it was still quite dark and that the recitation was not completed until just shortly before sunrise. The Mālikīs classify each of these reported actions as makrūh, which provokes some of ash-Shāfi^{c}ī's strongest condemnations in "Ikhtilāf Mālik". He states that he cannot conceive of how one could consider anything the Prophet did as being makrūh and states that this position which the Mālikīs have taken is a clear indication of the weakness of their school [madhhab] in all matters. With regard to the reported actions of 'Abū Bakr and ^{c}Umar, ash-Shāfi^{c}ī contends that the Mālikīs have gone against the ^{c}amal of their own 'imām's, which he takes to be an indication of the overall weakness of their school. He concludes that they are so heedless and negligent that they should not even be permitted to give fatwā's much less to consider themselves superior to others in the knowledge which they possess. Later, in a similar instance ash-Shāfi^{c}ī con-

cludes that the Mālikīs are simply arbitrary and that they make offhanded decisions on the basis of their whims and fancies without any reflection [tabaṣṣur] or sound deliberation [ḥusn rawīyah].[1]

The behavior reflected in each of these reports is contrary to normative ᶜamal regarding the manner in which the five daily community prayers are to be prayed; that ᶜamal, on the contrary, is in accordance with the ḥadīth mentioned earlier which Mālik transmits in the Muwaṭṭa':

> When any of you leads the people in prayer, let him go easy. For there are among them the weak and the sick and the old. But when anyone of you prays alone, let him lengthen his prayer as long as he desires.[2]

It might be pointed out, furthermore, that the recitation in the evening prayer is normatively the shortest of all, while the normative recitation in the dawn prayer is generally the longest. Nevertheless, the exceedingly long recitations which 'Abū Bakr and ᶜUmar are reported to have made on two different occasions are far in excess of the norm and would make praying the dawn prayer unbearable for the generality of the people if they were made the desired norm.

These actions which the Prophet, 'Abū Bakr, and ᶜUmar are reported to have done, therefore, are makrūh from the standpoint of normative conditions and behavior, i.e., they are makrūh from the standpoint of the moderate norm of ᶜamal as regards the performance of the daily prayers--a norm which

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[1]See above, pp. 262-267. [2]See above, pp. 442-444.

the Prophet himself established. And the acts which the Prophet, 'Abū Bakr, and ᶜUmar are reported to have done in these isolated instances would have been exceptional behavior even for themselves. Mālik's designation of these isolated acts as makrūh appears to me to be an instance of the application of sadd adh-dharā'iᶜ with the purpose of keeping those persons who hear these reports but who are unable to discern that they reflect exceptional behavior from attempting to put them into practice and make them normative, thinking in so doing that they are adhering to the examples of the Prophet and the first two caliphs.[1]

According to the analysis made earlier of different types of non-normative behavior, these reports are examples of exceptional public behavior.[2] The transmissions which report these acts do not give dates or contextual circumstances; nevertheless, one can imagine a variety of exceptional, even emergency, conditions in which the exceptional behavior of the Prophet, 'Abū Bakr, and ᶜUmar as reported in these texts might have taken place and in which that behavior would have been appropriate--such as during times of unusual communal anxiety as, for instance, during some of the wars, famines, and plagues that the community faced during the days of the Prophet and the early caliphate.

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[1]For sadd adh-dharā'iᶜ, see above, pp. 262-267.

[2]See above, pp. 442-444.

Nevertheless, as appropriate as these actions may have been for the unreported historical circumstances in which they occurred, the isolated properties of the acts themselves are such that they could be very detrimental to the community if they were made normative procedure under normal circumstances. As mentioned in the preceding discussion, the value, quality, and even the meaning of outwardly identical acts may change radically in terms of whether those acts are frequent or infrequent and also in terms of the circumstances under which they are done. Whatever properties an act has in isolation, those properties become magnified or exaggerated once the act ceases to be isolated and becomes more frequent, habitual, or persistent. And, according to ash-Shāṭibī's assessment of the nature of isolated and habitual actions, once an act becomes frequently repeated it must be evaluated and classified in terms of the ends which it serves, if they are beneficial then frequent repetition of the act becomes desirable but if they are detrimental then frequent repetition becomes strictly discouraged. Making a normative community practice out of reciting the Qur'ān for hours on end during the dawn prayer, while the congregation stands shoulder to shoulder, silent and motionless behind the reciter--some of the people being sick, weak, old, or preoccupied with other legitimate concerns--would soon become unbearable and intolerable for the community and threaten to make religious observance for them something odious. Therefore, although not

prohibited as an isolated act and conceivably quite appropriate under certain exceptional circumstances, the permissibility of this manner of recitation in communal prayer--like the permissibility of many mubāḥ acts in general, according to ash-Shāṭibī's analysis of them--is not absolute and would not extend beyond isolated circumstances and exceptional conditions.[1]

The Normativeness of ᶜAmal and Mālik's Concern for Maṣlaḥah

In the light of the preceding theoretical discussions about the relationship between the normativeness of ᶜamal and the general well-being of Muslim society, it is clear that there is a correlation--in terms of that conception--between the maintenance of and adherence to a properly balanced, normative ᶜamal and the concern for maṣlaḥah, which has been described as the ultimate concern in Mālik's thought and in the legal theory of the Mālikī school. For, as pointed out earlier, a moderate and properly balanced ᶜamal, which is neither too demanding nor too lax, would constitute a concrete embodiment of such principles as rafᶜ al-ḥaraj, which takes a very high priority in Mālik's legal method and is one of the primary bases upon which he applies the principle of istiḥsān.[2]

Mālik's concern for maṣlaḥah is particularly manifest

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[1]See above, pp. 463-465. [2]See above, pp. 462-463, 245-261.

in the conception and application of istiḥsān, sadd adh-dharā'i^{c}, and al-maṣāliḥ al-mursalah, which have been treated earlier.[1] The question arises, therefore, as to whether or not in the structure of Mālik's legal thought and Mālikī legal reasoning there might have been any connection between the concept and application of these three legal principles and the concept of normative ^{c}amal.

As indicated earlier in the prefatory treatment of these three principles, one of the fundamental characteristics of them is that of drawing exception to general precepts of law under special circumstances, because in the context of those circumstances literal application of the general precept would no longer be appropriate--indeed, under certain special circumstances literal application of the general precept would be contrary to the legal purpose of the precept.

Istiḥsān functions, for example, by making certain matters permissible which would appear to be prohibited in the light of pertinent general precepts of law. In terms of legal theory, istiḥsān draws exception in such cases on the grounds that it is contrary to the purpose of the pertinent general precepts to be applied to the unusual or otherwise special circumstances of the case. Sadd adh-dharā'i^{c} functions in essentially the opposite manner, by prohibit-

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[1]See above, pp. 245-279.

ing certain matters which ostensibly would appear to be permissible in the light of pertinent general precepts of law; sadd adh-dharā'i^{c} draws exception to such general permissibility, however, because under the special circumstances of the case there is sufficient reason to believe that such permissibility is being used as a license to accomplish goals which are detrimental to society and have been prohibited by Islamic law, i.e., detrimental legal fictions. Al-Maṣāliḥ al-mursalah, after the manner of istiḥsān and sadd adh-dharā'i^{c}, has both attributes of making special permissions and special prohibitions, and in that regard al-maṣāliḥ al-mursalah can be regarded as a broadly inclusive concept of maṣlaḥah of which istiḥsān and sadd adh-dharā'i^{c} are limited branches. Nevertheless, as indicated earlier, the principle of al-maṣāliḥ al-mursalah also contains properties which are not contained in either of the other two principles. For there is a sense of normativeness and simple contrariness, but not contradiction, in the exceptions which are drawn to general precepts of law by istiḥsān and sadd adh-dharā'i^{c}, while there may often be a sense of emergency and true contradiction in the exceptions drawn by way of al-maṣāliḥ al-mursalah. Furthermore, al-maṣāliḥ al-mursalah also includes the additional property of providing the sanction of Islamic law for new legal rulings, instruments, and institutions which are without precedent but compatible with the ultimate purposes of

Islamic law.[1]

It is unmistakably clear, therefore, that each of these three legal principles is oriented towards Islamic society as a whole. The initial purpose of istiḥsān, for example, is to protect fundamental social and individual maṣāliḥ in individual cases and special circumstances--maṣāliḥ which would be obliterated by blind application of the letter of general precepts without a view to the ultimate purposes which those general precepts were intended to accomplish. As a result, istiḥsān has the attendant purpose of protecting Islamic society from the mafāsid which would come about by faulty application of the general precepts. The initial purpose of sadd adh-dharā'i^{c}, on the other hand, is to protect society from the mafāsid which would come about as the result of using outward observance of permissible forms of Islamic legal conduct as means to secure and justify aberrations which are contrary to Islamic law and which it was not the purpose of those forms of conduct to permit. And, as a result, sadd adh-dharā'i^{c} has the attendant purpose, by not allowing the law to be circumvented, of securing those maṣāliḥ for which the general precepts were originally intended.

Al-Maṣāliḥ al-mursalah, while having the properties of these two, involves--for example, in the case of emergency measures--the designation of priorities among the various

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[1]See the comparative discussion of these principles, above, pp. 275-279.

maṣāliḥ which it is the purpose of Islamic law to attain in order to determine which of them are the most essential and which of them, in emergency situations, can be sacrificed at the expense of others. In so far as al-maṣāliḥ al-mursalah involves the creation of new legislation which is consistent with the law but without precedent, it is the purpose of this dimension of al-maṣāliḥ al-mursalah to insure that the same ultimate purposes which the forms, instruments, and institutions of Islamic law were intended to acquire in the old society under former conditions will be acquired in the new society under different circumstances.

Thus, istiḥsān, sadd adh-dharā'i^{c}, and al-maṣāliḥ al-mursalah may be conceived of as tools of ijtihād especially designed for preserving the normative and moderate equilibrium of an Islamic ^{c}amal which is neither too exacting so as to create general disaffection nor too permissive so as to bring about social decadence. Furthermore, they are the vehicles by which such a normative ^{c}amal is passed along to succeeding generations and changing societies or for creating such a normative ^{c}amal in the midst of non-normative circumstances.

Istiḥsān, for example, is a mechanism of lenience, which prevents ^{c}amal from becoming too rigorous and austere. Sadd adh-dharā'i^{c}, on the other hand, is a mechanism of strictness, which prevents ^{c}amal from becoming too lax and which keeps the letter of the law from becoming meaningless. In

this regard, istiḥsān and sadd adh-dharā'i^{c} are essential to the internal workings of a living, Islamic ^{c}amal under normal circumstances, irrespective of whether or not that society is undergoing social transformation.[1] Istiḥsān, for example, often pertains to some of the most common types of social behavior--such as the manner in which people buy, sell, and rent out their property, agricultural agreements, and so forth. Attempts to find ambiguities in the law to circumvent its purpose--such as finding ostensibly legal methods to defraud creditors, as in the example given in the treatment of sadd adh-dharā'i^{c} above--are also naturally to be expected in human societies, regardless of whether or not those societies are in the process of social change.

The nature of the principles of istiḥsān and sadd adh-dharā'i^{c} is such, however, that they are also well-suited for responding to growth and social change and creating an appropriate normative ^{c}amal for the new situation, although this element of responding to social change and unusual challenges to society is more prominent in the principle of al-maṣāliḥ al-mursalah. Theoretically, according to al-Qarāfī,

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[1]Because istiḥsān and sadd adh-dharā'i^{c} are very common even in normal societies, while striking examples of al-maṣāliḥ al-mursalah are more common in societies undergoing change, unstable societies, or societies threatened from the outside--one finds more examples of istiḥsān and sadd adh-dharā'i^{c} than striking examples of al-maṣāliḥ al-mursalah in Mālikī law works that were compiled in relatively stable Islamic societies. Ash-Shāṭibī, for example, takes many of his illustrations of al-maṣāliḥ al-mursalah from the early caliphate, one of the purposes of which was to lay the foundations

the substance of Islamic law may be divided into two categories: 1) those matters which constitute ultimate ends in themselves [maqāṣid] and 2) those matters which constitute means [wasā'il] to those ends. It is the ultimate purposes of the law which have intrinsic value, as it were, and, hence, it is the ultimate purposes of the law which are permanent and unchanging. Those aspects of the law which are means to ends do not possess intrinsic value; on the contrary, they are instrumental values which are subordinate to the ultimate purposes of the law. Hence, they remain legally valid only as long as they continue to be effective means for securing the ends for which they were intended. Those principles like istiḥsān, sadd adh-dharā'i^{c}, and al-maṣāliḥ al-mursalah which are means of securing basic maṣāliḥ and averting mafāsid are such instrumental values. Therefore, legal rulings, procedures, or institutions which grow out of them have no permanence but, as al-Qarāfī indicates, remain legitimate only as long as they continue to be effective means of attaining the ultimate purposes for which they were originally designed.[1]

From a theoretical standpoint, therefore, the principles of istiḥsān, sadd adh-dharā'i^{c}, and al-maṣāliḥ al-mur-

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for a stable Islamic society in the midst of complex and unprecedented challenges. Similarly, he takes examples from later societies, such as perhaps that of his own late Andalusian Granada, which were faced with unusual domestic and foreign problems.

[1]See above, pp. 272-273.

salah would also require the alteration of types of ᶜamal which were no longer operable and the development of appropriate counterparts to take their place. In order to maintain the equilibrium in ᶜamal for which they were intended, the principles of istiḥsān and sadd adh-dharā'iᶜ would require alteration of those earlier products of istiḥsān and sadd adh-dharā'iᶜ which no longer accomplished that end. The principle of al-maṣāliḥ al-mursalah would provide the specific legislation, instruments, and institutions necessary for building a normative ᶜamal under unprecedented or extraordinary conditions and to provide the mechanism for creating internal stability and social cohesion, and in those situationsin which the existence of the society itself is at stake, al-maṣāliḥ al-mursalah would provide the resources to take whatever steps and make whatever sacrifices were necessary to preserve the community, which itself is the matrix without which a normative ᶜamal cannot develop.

The Use of ᶜAmal in Conjunction with Legal Texts

ᶜAmal and ᶜUmūm al-Balwā[1]

As mentioned earlier 'Abū Ḥanīfah is said to have rejected the implications of isolated ḥadīth whenever they pertained to matters of the nature of ᶜumūm al-balwā and were not supported by well-established sources of law or recognized

[1]For treatment of the concept of ᶜumūm al-balwā, see above, pp. 184-188.

as valid by the [Kūfan] fuqahā'.[1] I also cited a report earlier which is attributed to Mālik and which, if authentic, would indicate quite clearly his consciousness of the concept of ᶜumūm al-balwā, although there is no evidence that I know of of Mālik's having used the term itself.[2] In Bidāyat al-Mujtahid, Ibn Rushd compares Mālik's use of ᶜamal in interpreting ḥadīth to 'Abū Ḥanīfah's application of the concept of ᶜumūm al-balwā and draws the conclusion that both methods are very cognate.[3]

ᶜAmal by virtue of the fact that it is the normative behavior of a society and not an individual has the same attribute of generality with which 'Abū Ḥanīfah is concerned in the conception of ᶜumūm al-balwā. Indeed, one could say that ᶜamal is the concrete manifestation of ᶜumūm al-balwā, although, of course, certain aspects of ᶜamal would be more general and more frequently repeated than others. The occasions ['asbāb] of precepts embodied in ᶜamal are often so common and recur so frequently, according to Ibn Rushd, that he does not regard it to be reasonable [lā yajūz] that the

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[1]See above, pp. 184-185, and appendix 1, below.

[2]See above, pp. 186-187.

[3]As pointed out earlier, 'Abū Zahrah holds that there is consensus among Mālikī legal theorists that the legal implications of isolated ḥadīth will be rejected whenever they pertain to matters of ᶜumūm al-balwā and are not supported by other sources of law--of which, of course, Madīnan ᶜamal would be a primary source. He cites illustrations of such types of precepts and also believes that Mālik's refusal to transmit ḥadīth that no one else was known to have transmitted and which had unusual implications reflects a parallel concern; see above, pp. 185-186.

people of Madīnah should have forgotten, distorted, or intentionally have put them aside during the generations prior to Mālik. In general, therefore, Ibn Rushd regards Mālik's reliance upon ᶜamal as legitimate and is also of the opinion that Madīnan ᶜamal constituted a surer criterion by which to interpret ḥadīth than the Kūfan tradition upon which 'Abū Ḥanīfah relied, primarily because Ibn Rushd has greater confidence in the integrity of the Madīnan community and the liklihood that they would have preserved their ᶜamal intact.[1]

When the legal implications of a ḥadīth are in conformity with Madīnan ᶜamal, Ibn Rushd continues, there is a high probability [ghalabat ẓann] that that implication is valid. On the other hand, when the legal implications of a ḥadīth are contrary to ᶜamal it is much less likely [i.e., there is ḍaᶜf ẓann] that those implications are a valid part of Islamic law. Thus, when the implications of a ḥadīth are contrary to ᶜamal, Ibn Rushd generally regards that to be an indication that the ḥadīth was abrogated, that there has been something wrong with the transmission of the ḥadīth, or that for some other reasons the legal implications of the ḥadīth are not legally binding. Nevertheless, Ibn Rushd does not believe that it is categorically valid to reject the implications of well-established isolated ḥadīth in all cases in which they are contrary to Madīnan ᶜamal. He holds, rather,

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[1]See Ibn Rushd, 1:102 (7); cf., 1:140 (29).

that the reliability of ᶜamal in such cases depends on to what extent the matter in question is of the nature of ᶜumūm al-balwā. He concludes that ᶜamal is a sufficiently conclusive criterion in terms of which to reject contrary, well-established ḥadīth when they pertain to matters that are clearly of the nature of ᶜumūm al-balwā, while he believes that ᶜamal is not a sufficiently conclusive reference in matters that are of a rarer and more unusual nature and, hence, do not pertain directly to ᶜumūm al-balwā.[1]

ᶜAmal in Conjunction with Supporting Legal Texts

ᶜAmal supported by authentic corroborating ḥadīth is of the category of what later theorists termed to be ᶜamal naqlī, which they deemed to be the most authoritative type of Madīnan ᶜamal because of its direct connection with Prophetic authority. The most conclusive type of ᶜamal naqlī, according to the opinions of Ibn Rushd, ᶜIyāḍ, and ash-Shāṭibī, is that which is supported by conforming ḥadīth--as opposed to those types of ᶜamal naqlī for which there were no ḥadīth, regarding which there were contrary ḥadīth, and so on. Ibn Rushd has referred to this type of ᶜamal in the preceding discussion on ᶜamal and ᶜumūm al-balwā and states that he holds that there is very high probability that such types of ᶜamal are valid. Ash-Shāṭibī refers to those types

[1]Ibn Rushd, 1:102 (15).

of ᶜamal which are confirmed by authentic ḥadīth as "as-sunnah al-muttabaᶜah wa 'ṣ-ṣirāṭ al-mustaqīm" [that sunnah which has been followed (adhered to; complied with) and the straight way]. Ash-Shāṭibī identifies this type of ᶜamal in his discussion of the implications of the normativeness of ᶜamal in connection with the non-normativeness of certain aspects of the Prophet's reported behavior. The term as-sunnah al-muttabaᶜah--which reminds one of 'Abū Yūsuf's as-sunnah al-maᶜrūfah [the well-known sunnah] and similar expressions he uses[1]--indicates how, according to ash-Shāṭibī's conception of ᶜamal, the conformity of ᶜamal and ḥadīth is a sure demonstration that the legal implications of those ḥadīth were intended to be normative. Hence, ash-Shāṭibī regards the authority of this type of ᶜamal to be very great and holds that it is incumbent upon the Islamic community as a whole to follow it.[2]

Mālik often cites ḥadīth and āthār in the Muwaṭṭa' which are in conformity with Madīnan ᶜamal and indicate the continuity of the precept in question. As pointed out earlier, precepts in conjunction with which Mālik uses the term -zĀIb ["wa hādhā 'l-'amr al-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm bi-baladinā"] are often accompanied by such corroborating ḥadīth.[3] 'Abū Zahrah points out, furthermore, that when iso-

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[1]See above, pp. 202-204.

[2]Ash-Shāṭibī, Al-Muwāfaqāt, 3:56; for ᶜIyāḍ on the conformity of ᶜamal and ḥadīth, see, ᶜIyāḍ, 1:70-71.

[3]See above, pp. 397-398.

lated ḥadīth are in conformity with Madīnan ᶜamal, they are no longer regarded to be of the category of isolated ḥadīth in Mālikī legal theory,[1] about which I will say more shortly in the discussion of Madīnan ᶜamal as the semantic context for ḥadīth and the criterion by which early muḥaddith's may have determined what it was necessary to transmit and what it was not.

One of the most explicit statements I have found pertaining to Mālik's use of ᶜamal as a criterion against which to evaluate ḥadīth is the citation I have taken from Ibn al-Qāsim in the Mudawwanah. In this citation, Ibn al-Qāsim makes very clear how authoritative the reference of ᶜamal was deemed to be and how important it was that ḥadīth be in conformity with ᶜamal in order to be regarded as valid sources of law:

> This has come down [to us], and if this ḥadīth had been accompanied by ᶜamal such that that [practice] would have reached those whom we met during our lifetimes and from whom we received [our learning] and those whom they had met during their lifetimes, it would indeed be correct to follow it. . . .
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> . . . Rather, ᶜamal is set down in accordance with those [ḥadīth] which have been accompanied by the practices ['aᶜmāl] [of the earlier generations] and which had been followed by the Companions of the Prophet, who were his followers; and similarly the Successors followed them in like manner without regarding that which had come down and been transmitted to have been fabricated or rejecting them outright.
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> Thus, that is passed over which has been passed over in ᶜamal, and it is not regarded to have been fabricated. But ᶜamal is put into practice in accordance with

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[1]See 'Abū Zahrah, Mālik, p. 305, and above, p. 179.

that which has [long] been practiced as ᶜamal, and it is regarded to be certainly authentic.[1]

ᶜAmal in Conjunction with Contrary Legal Texts

The preceding citation from Ibn al-Qāsim indicates explicitly that ḥadīth that were contrary to Madīnan ᶜamal were not regarded to be valid sources of law in the Madīnan school; it is important to note, however, that such ḥadīth are not necessarily regarded as having been fabricated, a point which Ibn al-Qāsim stresses repeatedly. I have given other citations as well to indicate that Mālik and Ibn al-Qāsim did not necessarily question the authenticity of ḥadīth which were contrary to ᶜamal.[2] According to Ibn ᶜAbd-al-Barr, as pointed out earlier, the majority of the Mālikīs reject musnad and mursal ḥadīth whenever they are contrary to ᶜamal.[3] Al-Qāḍī ᶜIyāḍ draws a distinction, however, between whether or not the ᶜamal which is contrary to a given ḥadīth is ᶜamal naqlī or ᶜamal which resulted from ijtihād, and he states that the majority of the Mālikīs have held that authentic isolated ḥadīth take precedence over Madīnan ᶜamal, whenever the ᶜamal to which they are contrary is one which resulted from ijtihād.[4] Ash-Shāṭibī, however, would not agree with ᶜIyāḍ, according to my understanding of ash-Shāṭibī's treatment of ᶜamal, for--as will be seen later in this chap-

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[1]See above, pp. 180-181. [2]See above, p. 173.

[3]See above, p.160. [4]ᶜIyāḍ, 1:71.

ter in the discussion of ḥadīth for which there is no corresponding ᶜamal--ash-Shāṭibī holds that it is not valid to put the legal implications of such ḥadīth into practice in the absence of supporting ᶜamal, which is essentially Ibn al-Qāsim's position as well.[1]

ᶜAmal indicates abrogation

When there is true contradiction between the legal implications of a ḥadīth of accepted authenticity and the ᶜamal of Madīnah, that contradiction is generally taken to be an indication that the legal content of the ḥadīth had been abrogated and that the corresponding abrogating precept is that which is embodied in ᶜamal. Theoretically speaking, abrogating types of ᶜamal would have to be of the category of ᶜamal naqlī, since the abrogation of established precepts rests on Prophetic authority.

Ibn Taimīyah refers to this usage of ᶜamal as a basis by which to determine between abrogated precepts of law and their abrogating counterparts,[2] and a few of the ᶜamal precepts which I have studied in my analysis of Mālik's terminology are apparently examples of ᶜamal being used to indicate abrogation. Ash-Shāṭibī cites examples of ḥadīth in Al-Muwāfaqāt which the Madīnans have held to be abrogated by reference to ᶜamal. He points out that just as there are Qur'ānic verses which clearly abrogate others so there were ḥa-

[1]See above, pp. 509-514. [2]See above, p. 366.

dīth which abrogated the precepts contained in other ḥadīth. It is, of course, necessary for the mujtahid to distinguish between these two categories; nevertheless, ash-Shāṭibī continues, it is often very difficult on the basis of textual evidence alone to determine conclusively which ḥadīth was abrogating and which abrogated. He cites a statement attributed to Mālik's teacher Ibn Shihāb az-Zuhrī, according to which he states that the fuqahā' have often been incapable of determining which of the Prophet's ḥadīth fell in each of these two categories. Ash-Shāṭibī continues to say, however, that Mālik's reliance upon ᶜamal made the matter of distinguishing between abrogated and abrogating ḥadīth relatively easy for him.[1]

Āthār [reports about the Companions], it should be pointed out, can be used to indicate abrogation in a manner very similar to the use of ᶜamal for that purpose. The use of āthār as a reference against which to interpret ḥadīth and as an independent source of Islamic law--which is part of the legal theory of the Mālikī, Ḥanafī, and Ḥanbalī schools[2]--is, in fact, only slightly different than using ᶜamal for the same purposes. By looking to the āthār of the early community, one sees the remnants of the ᶜamal of the generation in which the Companions lived. By studying the legal behav-

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:69-70.

[2]See above, pp. 161-169.

ior of the Companions in the post-Prophetic period, therefore, one can get a clear picture of which precepts they regarded to still be binding upon themselves and which they did not. Mālik makes frequent use of āthār throughout the Muwaṭṭa'; I have noted, however, that the use to which Mālik puts āthār is especially prominent in some of the ᶜamal chapters. In the ᶜamal chapter on the ceremony of ᶜaqīqah, for example, Mālik's use of āthār is interesting in light of the fact that some Kūfans had claimed, contrary to Madīnan ᶜamal, that the practice of ᶜaqīqah was one of the pre-Islamic customs which had been abrogated. Mālik makes it quite explicit, however, that the custom of ᶜaqīqah is part of the continuous ᶜamal of Madīnah since the days of the Prophet; as if to confirm this further, he cites āthār in that chapter which indicate that ᶜaqīqah was performed for each of the Prophet's grandchildren, that the Companion Ibn ᶜUmar saw to it that ᶜaqīqah was performed for the newly born children of his extended family, and that the prominent Madīnan Successor ᶜUrwah ibn az-Zubair also saw to it that ᶜaqīqah was habitually performed. Thus, for Mālik, there can be no question of ᶜaqīqah's having been abrogated.[1]

ᶜAmal distinguishes between desired norms and exceptional behavior

As indicated in the initial discussion on the norma-

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[1]See below, pp. 687, 560; cf., 646.

tiveness of ᶜamal, it is possible for reported texts to be contrary to ᶜamal without that contrariness being proof of the lack of authenticity of either. Indeed, when placed in their proper historical context from which they have sometimes been isolated by the process of transmission, such contrary reports may not contradict the normative ᶜamal at all. As I have indicated, ash-Shāṭibī gives considerable attention to the nature of ambiguity in authentically reported texts. He states, for example, that it is in the nature of ẓāhir statements--statements which have certain obvious implications but also contain some element of ambiguity--to lead to apparent contradiction when taken out of context; he holds, in fact, that one of the most fundamental characteristics of literalist [ẓāhirī] and esoteric [bāṭinī] heresies has been that they set forth their teachings on the basis of reports and statements which have been taken out of context.[1]

Thus, one of the primary functions of ᶜamal with legal texts, according to ash-Shāṭibī, is that it serves as a criterion by which to remove the implicit ambiguities of texts and to distinguish between the normative and the exceptional.[2] The method of using ᶜamal in this manner is, again, very clear in the citation from Ibn al-Qāsim in the Mudawwanah. For although Ibn al-Qāsim is not sure how to account for

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[1]See ash-Shāṭibī, Al-Muwāfaqāt, 3:76, 90-91, 352, 408-409; and above, pp. 176-178, 189, 223-224, 436-448.

[2]See above, pp. 178, 448.

the ambiguities in some of the texts he refers to--the authenticity of which he does not doubt--there is no question in his mind that it is ᶜamal and not those contrary implications which is to be followed.

Although ᶜamal and āthār serve essentially the same function in distinguishing between abrogated and unabrogated legal texts, i.e., texts in which there is true contradiction--I do not believe that this is exactly the case with regard to the use of ᶜamal as a criterion by which to distinguish between normative and non-normative ḥadīth. On the contrary, normative and exceptional matters can be confused with each other in āthār just as they can be in ḥadīth. For the ambiguities of ḥadīth in this regard are ambiguities which are implicit in the nature of reported texts--regardless of whom they pertain to--when they are removed from their historical contexts.

Thus, the non-normative behavior of a Companion can be reported along with reports of his normative behavior, just as a statement that Companion made, which was originally quite clear, may be rendered ambiguous by a process of transmission which fails to report sufficient additional information so that the context and scope of the statement are clear.

In my analysis of Mālik's terminology in the Muwaṭṭa' I have found examples in which it appears that Mālik has relied upon the non-textual source of Madīnan ᶜamal to distinguish between normative and non-normative ḥadīth and āthār

which it would be difficult to distinguish between on the basis of textual information alone.[1] In the case of ᶜaqīqah, for example, Mālik places normative āthār--i.e., āthār which report normative behavior with regard to the performance of ᶜaqīqah--in the ᶜamal chapter, while placing the non-normative āthār which report the custom of Fāṭimah of shaving off the hair of her children during the ceremony of ᶜaqīqah, weighing it, and giving that weight in silver as charity outside the ᶜamal chapter. On the basis of the texts of these āthār alone, however, one would not be able to determine which of the actions reported in them were normative and which of them were not.[2]

The following are examples of āthār taken from the Muwaṭṭa' which are contrary to normative ᶜamal and illustrate well, I believe, how the ambiguities between normativeness and non-normativeness can pertain to āthār just as they pertain to ḥadīth. Mālik cites an 'athar which reports how Ibn ᶜUmar used to perform ghusl [a bath which removes the state of ritual impurity]; in general, the actions reported in this 'athar reflect the normative manner in which ghusl is to be performed. The 'athar also reports, however, that it was Ibn ᶜUmar's habit to sprinkle water in his eyes while performing ghusl.[3] In most transmissions of the Muwaṭṭa', according

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[1]See below, pp. 588, 630-631, 661, 665, 672, 674, 752; cf., 591.

[2]See below, pp. 671-672. [3]Muwaṭṭa', 1:44-45.

to Ibn ᶜAbd-al-Barr, except for the transmission of Yaḥyā ibn Yaḥyā Mālik adds the clarification after this 'athar that Ibn ᶜUmar's habit of sprinkling water in his eyes while performing ghusl is an exception to ᶜamal. Ibn ᶜAbd-al-Barr comments further that Ibn ᶜUmar's habit of doing this is an instance of one of his eccentricities [shadhā'idh] which he did because of his piety [waraᶜ] and which no one else is known to have imitated him in doing.[1] Ash-Shaibānī affirms that the people of Madīnah did not regard Ibn ᶜUmar's habit as being a part of their ᶜamal but merely as a personal habit of his; he points out that 'Abū Ḥanīfah and the majority of fuqahā' are in agreement with the Madīnans on this matter.[2]

On the basis of the material presented in the text alone, however, one would not be able to isolate this habit of Ibn ᶜUmar as personal and non-normative from the other actions reported in the 'athar which are normative in accordance with Madīnan ᶜamal. Such a distinction, however, can be easily made when the content of the report is examined against the normative, non-textual tradition of ᶜamal. It might also be noted that this 'athar--although it gives no explicit indication to that effect--is reporting Ibn ᶜUmar's private behavior and not his public example. For it is to be presumed that he generally bathed himself in private and not in pub-

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[1]Cited by az-Zurqānī, 1:134.

[2]Ash-Shaibānī, Ḥujjah, 1:58, and idem, Muwaṭṭa', p. 45.

lic. Thus, Ibn ᶜUmar's eccentricity of sprinkling water in his eyes was not done repeatedly in the view of the public, such that it would have been likely that those of them who knew no better would begin to assume that one must sprinkle water in one's eyes while performing ghusl.[1] Nevertheless, such a distinction between private and public behavior which Ibn ᶜUmar would have been able to observe in his own manner of living can be lost, as it is in this example, once his private behavior is transmitted in the form of a report. At that time, something which he himself may have consciously kept as private is made public, while--as again in the case of this 'athar--no explicit indication is given that the report pertains to private behavior and, hence, may include aspects which were not intended to be normative.

Mālik cites another 'athar according to which a certain early Successor, 'Abū ᶜAbd-Allāh aṣ-Ṣanābiḥī,[2] who mentions in the report that he first came to Madīnah during the caliphate of 'Abū Bakr, states that he once prayed the even-

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[1]Cf., above, pp. 188-195.

[2]'ABŪ ᶜABD-ALLĀH ᶜAbd-ar-Raḥmān ibn ᶜUsailah ibn ᶜAsl ibn ᶜAssāl AṢ-ṢANĀBIḤĪ (d. between 70 and 80/689 and 699) came to Madīnah to see the Prophet but arrived, according to reports, five to six days after the Prophet had died. He transmits reports from and about 'Abū Bakr, ᶜUmar ibn al-Khaṭṭāb, Muᶜādh ibn Jabal, and other prominent Companions and also transmits ḥadīth from them. Aṣ-Ṣanābiḥī was regarded among the muḥaddith's as having been a reliable [thiqah] transmitter. He later settled in Syria and also partook in the conquest of Egypt. It is also reported that aṣ-Ṣanābiḥī became a close friend of the 'Umayyad caliph ᶜAbd-al-Malik ibn Marwān. Ibn Ḥajar, Tahdhīb, 6:229-230.

ing [maghrib] prayer directly behind the caliph 'Abū Bakr, [who was leading the prayer]. He mentions what 'Abū Bakr recited during the first two rakᶜah's of the prayer, which are recited aloud, and then says:

> . . . When he stood up for the third [rakᶜah], [which is recited silently,] I came up from behind him and got so close that my cloak almost touched his. I heard him recite 'Umm al-Qur'ān [the opening sūrah, which is recited in each rakᶜah] and then this verse, "Our Lord, let our hearts not go astray after You have granted us guidance, but bestow upon us mercy from Your Own presence: Verily, You are the One Who bestows benefaction [al-Wahhāb]."[1]

Mālik states in a report in the Mudawwanah that he does not regard it to be a part of ᶜamal that one recite the verse which aṣ-Ṣanābiḥī mentions in this 'athar during the third rakᶜah of the evening prayer after recitation of 'Umm al-Qur'ān.[2]

This 'athar illustrates how through the process of transmission types of behavior which are essentially private or isolated are made public and may even be given the appearance of being normative. This 'athar is perhaps somewhat exceptional, however, in that aṣ-Ṣanābiḥī gives enough circumstantial detail that one can place the 'athar in context, which might not be done so easily if, for example, he would have simply reported, "'Abū Bakr did such and such or would do such and such," which is so frequently the style of such reports.

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[1]Muwaṭṭa', 1:79; the verse is Qur'ān, 3:7.

[2]Mudawwanah, 1:68 (10).

Much about the behavior reported in the 'athar is irregular. 'Abū Bakr had been reciting the verse to himself; thus, it was not expected that others would perceive that he was doing it and imitate him themselves, possibly making it part of their ᶜamal for praying the evening prayer. Aṣ-Ṣanābiḥī's act of coming up behind 'Abū Bakr during the prayer and getting so close to him that he could hear what 'Abū Bakr was reciting to himself is also irregular behavior. In this report, therefore, aṣ-Ṣanābiḥī almost by stealth, as it were, has learned information pertaining to the private dimension of 'Abū Bakr's behavior as opposed to his normative public example--information, at that, which 'Abū Bakr had made no effort to disclose. By the process of transmission, 'Abū Bakr's act takes on a notoriety which he probably did not intend it to have; it is apparently for this reason that Mālik indicates that it constitutes exceptional behavior and not a desired norm, attempting thereby to keep that which should be normative, according to Mālik, from being confused with that which should not be.

ᶜAmal naqlī in the absence of ḥadīth

At several instances during my analysis of Mālik's terminology in the Muwaṭṭa', I have found ᶜamal precepts which were probably of the category of ᶜamal naqlī--ᶜamal which went back to the Prophetic period and was regarded as hav-

ing had the tacit or explicit support of the Prophet--yet regarding which I found evidence of very few if any ḥadīth having been transmitted and which were not supported by other textual sources of Islamic law. In several other instances of ᶜamal naqlī the pertinent ḥadīth or other texts which support the precept are general and do not provide the full scope of the precept in question or the elaborate details of how it is implemented--information which Mālik provides by reference to the non-textual tradition of Madīnan ᶜamal.[1] The use of the term ᶜamal naqlī--literally, a type of ᶜamal which "transmits" precepts, etc.--is appropriate for such types of ᶜamal in view of the scarcity or complete lack of supporting or contrary ḥadīth in the pre- or post-Shāfiᶜī periods, since it is, indeed, the legal source of ᶜamal in such cases which is the vehicle of transmission and the primary source of law.

I have also referred at several points to the criticisms of 'Abū Yūsuf, ash-Shaibānī, and ash-Shāfiᶜī who insisted that there be corroborating texts to verify the content of Madīnan ᶜamal precepts before they would regard them to be authoritative. It is clear from some of these citations that the Madīnans, in fact, did not possess such texts, and--in the words of ash-Shaibānī--for the Madīnans to follow their

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[1]See below, pp. 553, 556, 604-605, 599-600, 606-608, 618, 622, 660, 750, 753-754, 562, 574, 655-656.

ᶜamal in the absence of texts is tantamount to following ẓann [conjecture]. Similarly, although ash-Shāfiᶜī acknowledges the presence of conjecture in isolated legal texts, he reasons that it is much more sinful to err by virtue of following no texts at all than it is to err by virtue of the conjecture in texts.[1]

Such insistence upon explicit supporting texts stands in contrast to the attitudes of Mālik and al-Laith ibn Saᶜd toward ᶜamal, who are confident of its continuity and the integrity of its tradition. It is also contrary to the attitude of circumspection which Mālik exercised toward ḥadīth, according to which he took more into consideration than merely the authenticity of the transmission. Although he took pride in having received his ḥadīth only from the best qualified and most reputable Madīnan ᶜulamā', Mālik is reported to have said that he would be a fool if he transmitted to the people everything which had been transmitted to him. He is said to have regretted having transmitted much of which he had already transmitted and to have been willing to discard a ḥadīth altogether whenever he felt it would be unwise to transmit it.[2] I have referred earlier to the caution the Madīnans exercised toward isolated ḥadīth in particular, which is exemplified by the statement attributed to Rabīᶜah, accord-

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[1]See above, pp. 339, 218-219, 300, 332, 341-355; cf., below, pp. 578-579.

[2]See above, pp. 76-85, 311-331.

ing to which Rabī^{c}ah indicates how much more authoritative than isolated ḥadīth he regards Madīnan ^{c}amal to be and in which he expresses his conviction that to follow such isolated ḥadīth instead of ^{c}amal would distort the sunnah.[1]

Mālik's position regarding the authority of ^{c}amal in matters regarding which there were no supporting ḥadīth is set forth explicitly in some of the reports attributed to him which I have cited. He acknowledges the absence of ḥadīth regarding certain types of ^{c}amal but also asserts that he does not regard ḥadīth as being necessary in such matters because of the conclusiveness of ^{c}amal. Mālik then insists that he regards Madīnan ^{c}amal to be more authoritative than ḥadīth in such matters.[2] Such an attitude regarding the authority of ^{c}amal in the absence of legal texts is consistent with the number of times in the Muwaṭṭa', which I have just referred to above, in which Mālik relies exclusively on ^{c}amal to set forth and elaborate legal precepts. Thus, the positions of Mālik and 'Abū Yūsuf, ash-Shaibānī, and ash-Shāfi^{c}ī regarding the role of legal texts as sources of law constitute very fundamentally different positions in legal theory.

The possible effects of ^{c}amal on the transmission of ḥadīth

In his work "Jimā^{c} al-^{c}Ilm" ash-Shāfi^{c}ī indicates that all ^{c}ulamā' agree that God has made it obligatory upon them

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[1]See above, pp.173-174, 341-343.

[2]See above, pp. 420-421.

and upon all Muslims to follow the sunnah of the Prophet. Ash-Shāfi^{c}ī's point of difference is not that he regards the Prophet's sunnah to be authoritative while other fuqahā' of his generation and earlier did not; rather, it is a point of difference regarding the means by which one should determine what the content of the sunnah was. Ash-Shāfi^{c}ī's distinctive contention in this regard is that explicit legal texts ["al-khabar ^{c}an Rasūl-Allāh"] are the only legitimate means by which to determine the content of the sunnah, and such legal texts include for ash-Shāfi^{c}ī, of course, formally authentic, isolated ḥadīth [khabar al-infirād].[1] Insistence upon exclusive reliance upon textual references as the only legitimate sources of Islamic law implies certain assumptions about the nature and quality of the transmission of ḥadīth and whatever other textual sources one restricts oneself to. The most central of these assumptions in the case of ash-Shāfi^{c}ī's reasoning, I believe, is the assumption that the authentic, legal texts upon which he relies constitute a sufficiently clear and comprehensive representation of the content, scope, and purpose of all Prophetic legislation.

This premise that ḥadīth convey a comprehensive picture of the Prophetic sunnah is clearly set forth, for example, in ash-Shāfi^{c}ī's Risālah. Early in that work, ash-Shāfi^{c}ī contends that one may determine the entire, authentic

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[1]See ash-Shāfi^{c}ī, "Jimā^{c} al-^{c}Ilm," pp. 250-251, and see above, pp. 341-356, 170-178, 216-226.

content of the Prophet's sunnah by collecting the ḥadīth of all of the qualified ᶜulamā'. Ash-Shāfiᶜī contends that none of them has knowledge of all aspects of the sunnah himself but that what one of them does not have knowledge of, another of them will. He compares the knowledge which the ᶜulamā' have of the sunnah to the knowledge which the Arabs as a people have of the Arabic language. There are no Arabs, he holds, who have mastered the Arabic language in its entirety and understand, for example, all of its vocabulary. Nevertheless, the knowledge which some of them possess compensates for what others of them are ignorant of and vice versa. Ash-Shāfiᶜī claims that knowledge of the Arabic language is much greater, however, among the generality of Arabs than the knowledge of the sunnah is among the generality of the ᶜulamā'. He concludes that the only means by which one can come to know the entirety of the sunnah is by collecting the ḥadīth of all of the qualified ᶜulamā'.[1]

For ash-Shāfiᶜī, therefore, the content of the sunnah is something which is not yet completely known and the full scope of which remains to be discovered--almost two centuries after the Prophet's life. Yet, although he believes that none of the ᶜulamā' possesses complete knowledge of the sunnah in terms of the ḥadīth which they transmit, he is confident that there are no parts of the sunnah which have escaped

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[1]Ash-Shāfiᶜī, Ar-Risālah, pp. 42-44.

documentation in ḥadīth entirely. Ash-Shāfiᶜī does not reach the conclusion that no parts of the sunnah have escaped documentation in ḥadīth on the basis of empirical investigation, which would be impossible without possessing a criterion of sunnah independent of ḥadīth with which one could compare what is contained in ḥadīth, but by deduction from Qur'ānic verses and the like which indicate that God has not left man at liberty to follow his whims, that God will protect the guidance He has sent and not allow it to be lost, and so forth.[1] Such deductions, however, assume that ḥadīth constitute the sole vehicle by which the sunnah was transmitted, in which case preservation of the sunnah becomes tantamount to the preservation of ḥadīth.

It might be pointed out, furthermore, that ash-Shāfiᶜī does not address himself in the above discussion to differences between a normative sunnah of the Prophet and the minute details of the Prophet's reported behavior and statements, which included normative and non-normative aspects. There are only certain aspects of the Arabic language, for example, which no Arabs in ash-Shāfiᶜī's time would have mastered completely, and those would have been exceptional parts of the language--rare words, unusual expressions, and the like. As for the normative aspects of the language, the basic core of poetic language, and so forth--it is to be expected that

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[1]Cf., for example, ash-Shāfiᶜī, Ar-Risālah, pp. 152-158, 32, 109, 88-89; and idem, "'Ibṭāl al-Istiḥsān," pp. 270-271.

many Arabs, especially those who were knowledgeable of the language and its poetic traditon, would have been completely conversant with them. The details and rarities which such persons would not have known would have been relatively insignificant in comparison with what they did know. Furthermore, they would have been able to identify those details of the language with which they were not acquainted as being unusual and non-normative by comparison with the broad tradition of Arabic with which they were familiar.

Similarly, when one conceives of the sunnah as an essentially normative type of behavior which the Prophet--himself an easily accessible public person who cultivated close ties between himself and his followers--set over a period of many years, one would expect that there were Companions of his who became fully conversant with his sunnah and were able to distinguish between what aspects of the Prophet's behavior were customary and which were not. Indeed, the notion that the Prophet was successful in transmitting the full scope of his sunnah to the community of his immediate followers is one of the key presumptions underlying Mālik's conception of the Madīnan community and its normative ᶜamal. According to this conception, those aspects of the Prophet's teaching and behavior which he intended to be desired norms for his followers became their desired norms and, hence, what 'Abū Yūsuf refers to as the well-known sunnah: that criterion by which one who was familiar with it could distinguish

between what was standard and what was exceptional regarding the reports attributed to the Prophet.

In addition to this, however, ash-Shāfi^{c}ī's conviction that all aspects of the Prophet's sunnah and legislative activity had been documented in ḥadīth implies that the first generations of Muslims recognized it to be a necessity that they document all aspects of the sunnah in textual form, which would imply in turn that there were not other methods by which knowledge of the sunnah could be transmitted and preserved. In the report attributed to Mālik which I cited earlier and according to which Mālik defended his reliance upon ^{c}amal regarding how the 'adhān is supposed to be called, Mālik is reported to have said, "In such matters do you need 'so and so transmitting on the authority of so and so'? On the contrary, we regard this to be sounder than ḥadīth."[1] The historical question which arises in conjunction with statements of this nature and the fact that there was a scarcity or complete lack of ḥadīth on various fundamental parts of Madīnan ^{c}amal naqlī is the question of to what extent others before Mālik who were responsible for the selection and transmission of ḥadīth also shared the attitude of, "In such matters do you need 'so and so transmitting on the authority of so and so'?"

In other words, fundamental and well-established parts of ^{c}amal may in some cases have been regarded to be so well-

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[1]See above, pp. 420-421.

known that to transmit ḥadīth about them would be redundant. The Prophet's Companions, for example, did not learn Islam through textual materials; on the contrary, they learned by direct experience, by witnessing the events which transpired around them and by taking part in informal or semi-formal instruction. In the case of some of the prominent Companions this experience of Islam in the presence of the Prophet lasted more than two decades. It was this first generation which decided which of the authentic ḥadīth that have come down to us should be transmitted and which of the thousands of things they must have seen the Prophet do or heard him say need not be transmitted. The few hundred ḥadīth attributed to Companions like ᶜUmar ibn al-Khaṭṭāb, 'Abū Bakr, Zaid ibn Thābit, Muᶜādh ibn Jabal, and the likes of them, even if authentic, would reflect a very small amount of the knowledge these persons would have had.[1] Consciously or unconsciously, Companions such as these who did not transmit extensive amounts of ḥadīth must have had some criterion by which they decided what was most important for them to transmit. Thus, for such persons the well-known and well-established ᶜamal which they saw around them may have served as such a criterion, and they may have felt little need to transmit ḥadīth about what was already commonly known and practiced, especially regarding matters about which there may have been no significant disagreements in the early period.

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[1]See above, pp. 166-168.

Use of ᶜamal in the early period as a criterion by which to determine what needed to be transmitted is one possible hypothesis for accounting for the scarcity of ḥadīth regarding several fundamental precepts of Madīnan ᶜamal naqlī. If correct, such a hypothesis might also imply that those ḥadīth which were transmitted tended to pertain more commonly to matters that were not well-known in ᶜamal than they did to matters that were well-known. Much of the content of ḥadīth, therefore, might not have been of a normative nature or to have pertained to ᶜumūm al-balwā.

Secondly, I pointed out earlier that many of the ḥadīth which have been transmitted seem to be predicated on ᶜamal in that knowledge of the ᶜamal to which the ḥadīth pertains constitutes an important part of the semantic context or general reference of the ḥadīth. The semantics of many ḥadīth would appear very ambiguous to persons not already acquainted with the ᶜamal about which those ḥadīth are speaking. A person who had no idea of how to make wuḍū' or perform ṣalāh might draw any number of conclusions about how to perform them, if ḥadīth were the only references that person had.[1] Similarly, the references of many ḥadīth would be quite unintelligible and open to conjecture if isolated from the tradition in which they were transmitted, which keeps them in context, so to speak. Mālik cites the following ḥadīth, for example, which he places in the ᶜamal chapter pertaining

[1]See above, pp. 298-299.

to what one is supposed to do at the close of one's prayer to compensate for errors made while praying because of negligence or forgetfulness [as-sahw]:

> . . . The Messenger of God said, may God bless him and give him peace, "I forget (or, 'I am made to forget') in order that I set down a sunnah ["'innī la-'ansā ('aw 'unassā) li-'asunna"].[1]

Without reference to something outside this text, however, such as the tradition of the Madīnan ᶜulamā' who transmitted it, one would not know what context to put these words in, and they might be given a wide variety of interpretations.

The hypothesis that ᶜamal constituted the original semantic context of ḥadīth offers an explanation for the apparent ambiguity which characterizes the wording of some ḥadīth, when they are interpreted in isolation from ᶜamal. According to this hypothesis, much of the information essential to the understanding of such texts would have been sufficiently well-known and practiced at the time when the wording of the ḥadīth was framed. Such ḥadīth, because of the general familiarity of their original audience with the subject matter to which they pertained, would not have been as ambigous initially, and because of this familiarity of the audience there was no immediate need to include details in the text of the ḥadīth without which those who lacked a similar degree of familiarity would have difficulty discovering the ḥadīth's intended meaning.

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[1]Muwaṭṭa', 1:100.

As I have pointed out, many of the ḥadīth Mālik cites which pertain to ᶜamal naqlī precepts do not convey all of the legal details that are a part of those precepts. Mālik usually elaborates such precepts by reference to the non-textual source of Madīnan ᶜamal. Assuming that the ᶜamal naqlī is authentic in such cases and that the additional details which Mālik provides were actually part of the original ᶜamal of such precepts, the ḥadīth in these examples have the appearance of being comments about ᶜamal, so to speak, and do not have the effect of actually transmitting the precepts themselves. In the case of the ᶜamal regarding making rulings on the basis of the oath of the plaintiff supported by the testimony of a single witness--a precept to which I have referred several times--the ḥadīth which Mālik cites certainly does not transmit the precept but only provides the comment that the Prophet implemented it during his life.[1] In ḥadīth such as these, therefore, it appears that ᶜamal constituted the primary frame of reference. The ḥadīth, on the other hand, does not embody the ᶜamal precept to which it pertains but only corroborates or adds points of information regarding it.

Ḥadīth in the Absence of Corresponding Types of ᶜAmal

In his discussion of the relationship between ᶜamal and ḥadīth, ash-Shāṭibī also discusses types of ḥadīth which

[1]See below, pp. 571-576.

appear to have certain legal implications yet regarding which there was no corresponding ᶜamal which either supported or explicitly contradicted those implications. He also places in this category ḥadīth which have certain implications but regarding which only isolated persons are known to have put those implications into practice in the first generations but for which there was no widespread ᶜamal. Ash-Shāṭibī's position, which I will discuss in more detail shortly, is that such apparent legal implications in authentically transmitted ḥadīth cannot generally be made a part of ᶜamal in later generations if they were not a part of the widespread ᶜamal in the first generations.[1]

Al-Qāḍī ᶜIyāḍ holds a different position than ash-Shāṭibī on this matter. He holds that whenever a ḥadīth is authentic--even if it is an isolated ḥadīth and regardless of whether it was transmitted by Madīnan or non-Madīnan muḥaddith's--and there is no corresponding ᶜamal either supporting it or contradicting it, then one is obliged to follow the legal implications of that ḥadīth. ᶜIyāḍ defends the Mālikī school against the criticisms of those who, according to ᶜIyāḍ, have held that Mālik and his school refused to follow the implications of ḥadīth unless there was clear support for those implications in the ᶜamal of Madīnah. ᶜIyāḍ contends that, on the contrary, the Mālikī school only rejects ḥadīth when they are contradictory to ᶜamal but not when

[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:64-76.

there is simply no corresponding ᶜamal at all.[1]

Ash-Shāṭibī contends, on the other hand, that the mere absence of ᶜamal regarding the apparent legal implications of ḥadīth constitutes itself a contradictory ᶜamal to those implications. Ash-Shāṭibī bases this position on the premise that the first generations of Islam--with whom the establishment and perpetuation of ᶜamal began--had comprehensive knowledge of the practical demands which Islamic law made of them and that they were faithful in putting these demands into practice, i.e., making them ᶜamal. The Prophet and the Qur'ān had addressed them in their own idiom and in the context of the circumstances in which they were living; hence, they understood clearly, according to ash-Shāṭibī, the semantic implications of the directives and teachings they were given. Therefore, ash-Shāṭibī continues, when an authentic legal texts appears to be implying a certain practice which the Companions and the first generations would have been likely to have put into practice had they understood it to be demanded of them and, yet, they did not put those implications into practice, it follows that something else was intended by the semantics of that text and it would not be sound to make an ᶜamal of those implications at a later time.[2] Ash-Shāṭibī's use of ᶜamal in this manner is in keeping with the

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[1]ᶜIyāḍ, 1:71-72.

[2]Ash-Shāṭibī, Al-Muwāfaqāt, 3:73.

position of Ibn al-Qāsim in the Mudawwanah in which he stresses not just that ḥadīth not be contrary to ᶜamal but, in fact, that they be accompanied by ᶜamal.[1]

Ash-Shāṭibī continues to point out, however, that this restriction of the legal implications of texts to the ᶜamal of the first generations of Muslims applies only to those types of behavior which the first generations would have been able or likely to perform in the context of the circumstances in which they were living. Thus, he divides the types of behavior which the Companions and the first generations of Muslims did not do into two categories. There were, first of all, those sorts of things that were maẓinnat ᶜamal--i.e., the sorts of things which the first generations would have been expected to have put into ᶜamal had they regarded them to be valid parts of Islamic law and something which Islam intended that they do. It is only legal implications in texts which fall into this category which one does not put into practice in a later age if they had not been part of the ᶜamal of the first generations. The second category is that of types of behavior, legal procedures, and so forth that were not maẓinnat ᶜamal--things which were likely to have been done--within the context of the circumstances of the age in which these first generations were living. Matters which fall into this category, according to ash-Shāṭibī, must be evaluated in terms of the legal principle of al-maṣāliḥ al-

[1]See above, pp. 179-180.

mursalah.[1] If they are found to be in keeping with the dictates and ultimate purposes of Islamic law, they are desirable, and, if they are found to be contrary to the dictates and ultimate purposes of Islamic law, they are unacceptable.[2]

I referred earlier to a statement attributed to Mālik according to which he rejected the practice of performing prostrations of gratitude [to God] [sajdat ash-shukr] when one meets with some particular good fortune. The observation was made to Mālik that it had been said that 'Abū Bakr performed this sajdat ash-shukr after his armies achieved a great victory. Mālik denies the authenticity of the report and is reported to have replied:

> It is a type of misguidance that one hear something and then say, "This is something regarding which we have heard nothing to the contrary." . . . Many victories came to the Messenger of God, may God bless him and give him peace, and to the Muslims after him. Did you ever hear of a single one of them prostrating himself?
>
> When something like this comes down to you that has been part of the experience of the people and took place right in their midst and yet you have heard nothing about it from them, then let that be a sufficient indication for you. For if it had taken place, it would have been mentioned, because it is part of the common experience of the people ['amr an-nās] which took place among them. So have you heard that anyone prostrated himself? Well, then, that is the 'ijmā'. When something comes down to you that you do not recognize, put it aside.[3]

Ash-Shāṭibī comments after citing this report that it indicates that one should rely upon the general 'amal of the many and

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[1]See above, pp. 268-275.

[2]Ash-Shāṭibī, Al-Muwāfaqāt, 3:74.

[3]See above, pp. 186-187.

not follow the implications of reports of rarities and unusual actions which have been transmitted ["qalā'il mā nuqila wa nawādir al-'afᶜāl"] when the general and widespread ᶜamal is contrary to them.[1]

Ash-Shāṭibī cites and discusses several examples of ḥadīth and āthār with legal implications that he regards to be invalid because of the absence of a significantly widespread ᶜamal among the first generations of Muslims in keeping with those implications. Among these examples, he refers to ḥadīth which speak of the excellence of ᶜAlī ibn 'Abī Ṭālib, the mutual affection between him and the Prophet, and so forth and are among the proofs which the shīᶜah have used to indicate that the Prophet intended the political leadership [al-'imāmah] of the community to fall to his nephew ᶜAlī and the descendants of ᶜAlī and Fāṭimah, the Prophet's daughter, in succeeding generations. Ash-Shāṭibī holds that the absence of ᶜamal among the Companions in keeping with such implications and the general consensus of them regarding the caliphates of 'Abū Bakr and ᶜUmar are sufficient indications that, even if such texts are authentic, they did not have such political implications.[2]

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[1]See above, p. 187.

[2]Ash-Shāṭibī, Al-Muwāfaqāt, 3:71, 64-76.

THE UNIVERSITY OF CHICAGO

MĀLIK'S CONCEPT OF ᶜAMAL IN THE LIGHT OF MĀLIKĪ LEGAL THEORY

VOLUME TWO

A DISSERTATION SUBMITTED TO
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PART THREE

ᶜ*AMAL* IN THE *MUWAṬṬA'*:

AN EXAMINATION OF THE RELATIONSHIP BETWEEN ᶜ*AMAL* AND MĀLIK'S TERMINOLOGY IN THE *MUWAṬṬA'*

CHAPTER VI

GENERAL COMMENTS ABOUT MĀLIK'S TERMINOLOGY

Introduction

The terminology of the Muwaṭṭa' is one of the distinctive and very interesting characteristics of that book. It would be of considerable value to the intellectual history of Islamic law and legal theory if the meaning of Mālik's terminological usages could be disclosed, especially the relationship between them and Madīnan ᶜamal. The Muwaṭṭa', as I have indicated elsewhere, is essentially a source book of Madīnan ᶜamal, which makes up for Mālik a primary source of Islamic law.[1] Mālik's terminology in the Muwaṭṭa' constitutes the most extensive and systematic statement we have from Mālik, which I know of, regarding his conception and evaluation of Madīnan ᶜamal.

By disclosing what Mālik meant to convey to others by his terminology in the Muwaṭṭa', one gains insight into an important part of Mālik's conscious, analytical awareness of his legal reasoning. As I pointed out earlier, it is possible for a person to think in a systematic fashion without that person's being conscious of the system in his think-

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[1]See above, pp.97-107, 304-305.

ing or being able to articulate it to others. I concluded from this that in the study of intellectual history there are two main considerations: 1) the question of whether or not a thinker was systematic in his thinking and whether or not that system was consistent and highly developed and 2) the question of whether or not the thinker was conscious of the system in his thinking and able to articulate it to others. Furthermore, I concluded that the consideration of whether or not a thinker was conscious of any system in his thinking is irrelevant to historical study except in so far as it was communicated to others. For without such communication the thinker's articulate consciousness remains subjective and is not the proper object of objective historical study.[1] Mālik's terminological usages in the Muwaṭṭa'--regardless of whether or not they constitute a technically fully developed terminology--reflect not only Mālik's consciousness but also his attempt to communicate it to others.

Some of the Difficulties in Studying Mālik's Terminology

Mālik's terminology in the Muwaṭṭa' has not received much attention in modern studies on Mālik or Islamic law. Goldziher and Schacht treat Mālik's terms very briefly; Fazlur Rahman, Ahmad Hasan, Ansari, and Guraya treat them somewhat more extensively, although not going into detail, and conclude, as I mentioned earlier, that the various terms

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[1]See above, pp. 11-20.

Mālik uses are equivalent in meaning.[1] I have found surprisingly few discussions of Mālik's terms in the traditional Mālikī works to which I had access. The commentaries of al-Bājī and az-Zurqānī on the Muwaṭṭa', for example, often pass over Mālik's terms without commenting upon them, their primary concerns being generally to explain and support the precepts Mālik sets forth. Thus, in working with Mālik's terms I have not had much to rely on in either modern or traditional works.

In attempting to determine what Mālik's terms mean, one must first understand the legal precepts with which they are used. Furthermore, one needs to have knowledge of the background of those precepts--especially such considerations as whether or not they were points of difference between the Madīnan and Kūfan schools. One must determine the source of the precepts, for example, whether they are part of pre-Islamic Madīnan customs, whether they were instituted by the Prophet, or whether they resulted from later ijtihād and, if so, from whose. It is important to know whether or not the precepts to which Mālik subscribes are supported by or contrary to textual sources of law which Mālik would have been likely to have known, whether or not they are cited in the Muwaṭṭa'. Furthermore, it is important to attempt to determine how these precepts relate to other Madīnan precepts,

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[1]See above, pp. 308-309.

for example, whether they are analogous to or contrary to analogy with other precepts to which Mālik subscribes.

Trying to discover this background is time-consuming and sometimes frustrating. For example, Mālik is often reticent, setting forth his opinions and the precepts to which he subscribes with little or no explanation or discussion. He differs in this regard from ash-Shāfi^{c}ī, who usually sets forth his reasoning quite clearly, and to some extent from 'Abū Ḥanīfah as reflected in early Ḥanafī legal texts, which tend to classify legal opinions according to the analogies from which they were deduced or give other indications of the reasoning behind them.[1] Even when Mālik explains or discusses precepts, the modern researcher, despite having knowledge of Classical Arabic, may have great difficulty in following the discussion or in identifying what the significant points of it are, because the modern researcher is divorced from the semantic context of Mālik's discussion. This semantic context, which Mālik shared with those to whom he transmitted the Muwaṭṭa', is constituted by such things as the culture in which Mālik lived, recent historical experiences, and--perhaps most importantly--the familiarity that he and those specialists for whom the Muwaṭṭa' was compiled had with Islamic law and the discussions and controversies of the times. Even the Madīnan ^{c}amal, which Mālik

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[1]See 'Abū Zahrah, Mālik, pp. 19, 438-439; and see above, pp. 107-111.

sets forth in the Muwaṭṭa', was part of the experience of many of those to whom his book was transmitted and could be witnessed by others who came to Madīnah. Thus, Mālik's reticence is far more silent and ambiguous to the modern researcher than it is likely to have been for Mālik's contemporaries, unless the modern researcher can develop a comparable understanding of the Muwaṭṭa's semantic context.

Furthermore, with regard to the question of whether or not the precepts to which Mālik subscribes were supported by or were contrary to other textual sources of law--such as ḥadīth and āthār--which Mālik would have been likely to have known, it is very difficult to answer that question unless Mālik cites those texts himself in the Muwaṭṭa'. The soundest procedure methodologically would probably be to gather such information by carefully sifting through the data contained in the earliest legal sources available, Mālikī and non-Mālikī. Such a procedure, however, would call for massive research and would be especially exhausting in light of the fact that few of the early works now available in print have been properly indexed.

Later works, on the other hand, such as Ibn Rushd's Bidāyat al-Mujtahid, offer a tempting alternative to such exhausting research, and I have often drawn conclusions about the backgrounds of the precepts of the Muwaṭṭa' from what I could find in such later works. Conclusions based on such evidence, however, are only tentative. For there is a fun-

damental difference between taking rational hypotheses from later works and taking historical reports from them or summaries and evaluations about what is contained in the historical sources. Rational hypotheses about objective historical data, as I mentioned earlier, can come from any source. The validity of such hypotheses is determined solely by how predictably and comprehensively they account for the data. To reject such hypotheses merely by considering the sources from which they came would be argumentum ad hominem.[1] But this is not the case when establishing the authenticity of the objective, historical data about which one's hypotheses are made. In such cases, consideration of the nature or character of the source of the report is a fundamental part of evaluating the degree of the report's authenticity.

Thus, even though one may not doubt Ibn Rushd's honesty or that of any other later writer, for that matter, it is impossible to determine the authenticity of the information he reports without knowing the source oneself or the nature of its transmission to Ibn Rushd. Furthermore, there is the question of how comprehensive Ibn Rushd's sources were and how well he knew their contents. His summaries and evaluations about such sources--such as whether or not there are any ḥadīth in a given matter or whether or not the ḥadīth transmitted about it are authentic--can only be

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[1]See above, pp. 8-9.

accepted on faith or rejected on the basis of misgivings until one has access to objective data similar to that from which Ibn Rushd or any other writer drew his conclusions. Furthermore, considerations such as whether or not later traditional writers or modern writers regard various textual reports to be historically or formally authentic which Mālik probably had access to do not tell us whether or not Mālik regarded them as such.

Another important consideration in studying Mālik's terminology in the Muwaṭṭa' is that of how faithfully later transmissions and editions of the Muwaṭṭa' have handed down Mālik's terms. It is possible, for example, that some apparent inconsistencies in his terminology may have resulted from inaccurate transmission of the terms he uses. This danger would be greatest probably in the case of those transmitters and editors who were not aware of any distinctive differences between the terms Mālik uses. I found one example in ᶜAbd-al-Bāqī's edition of the Muwaṭṭa', for instance, in which he presents a precept as an AN [al-'amr ᶜindanā] on one occasion and as an AMN [al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā] a few pages later. Az-Zurqānī, however, says in both instances that the precept is an AN.[1] An exhaustive study of Mālik's terminology in the Muwaṭṭa' would involve collating the best manuscripts of the Muwaṭṭa' together.

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[1]See Muwaṭṭa', 2:837, 841, and az-Zurqānī, 5:115, 122.

Furthermore, until such collation is done it must be borne in mind that individual discrepancies in Mālik's terminology may come from Mālik's transmitters and editors and not from Mālik himself.

Does Mālik Actually Have a Systematic Terminology?

I approached Mālik's terminology in the Muwaṭṭa' with the hypothesis that his terminological usages in it had different values, as indicated by their conspicuously different wordings and the fact that they fall into several common classifications. Some of them--like AN [al-'amr ᶜindanā] and AMN [al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā]--occur repeatedly in the same form, while some of the more unusual usages may occur only once or twice. Furthermore, other than the instance to which I referred above, which I regard to be an editorial error, I could find no instance of Mālik's repeating the same precept twice in the Muwaṭṭa' and using different terms for it.[1] It is also true, however, that Mālik does not cite precepts in the Muwaṭṭa' more than once, as a rule.

One must keep in mind, however, while studying Mālik's terminology in the Muwaṭṭa' that it is possible for individual terms and usages in it to indicate meanings and even to have different values without being part of a systematic terminology. By a "systematic terminology" I have

[1]See above, p. 522, n. 1.

in mind a system of nomenclature in which each usage is assigned one, restricted value--which distinguishes it from other terms in the system--and in which each usage is used systematically in accordance with its assigned value. Thus, in a systematic terminology there should not be any overlapping of meanings between terms. But usages in a terminology may indicate different meanings and still not be used systematically because of the important difference between the manner in which words are used in a systematic terminology and the manner in which they are used in customary speech. Words in customary speech, especially common words, often have a wide semantic range. In a systematic terminology, however, the semantic range of a word is limited to one meaning precisely. This new, assigned meaning need not even be within the word's old semantic range. For, as I pointed out earlier, the relationship between the literal meaning of a term and the concept which it signifies can be purely arbitrary. Nevertheless, in linguistic--as opposed to purely symbolic--terminologies, one may expect there to be a significant relationship between the word's new, assigned meaning and the word's former semantic range. For there is probably something very telling in the word's former semantic range which made that word appeal to the fashioner of the terminology.[1]

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[1]See above, pp. 11-20.

It appears to me from my study of Mālik's terminology in the Muwaṭṭa' that there is some overlapping between terms. The term sunnah [S], for example, seems to be used only for al-ᶜamal an-naqlī and not for types of ᶜamal that are the result of later ijtihād.[1] However, other usages are commonly applied to precepts that pertain to al-ᶜamal an-naqlī, such as the terms -zĀIb ["wa hādhā 'l-'amr al-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm bi-baladinā"], ANs ["'amr an-nās"], the affirmative ᶜamal terms, and the contents of most of the so-called ᶜAmal Chapters.[2] Similarly, although the term 'amr [A] is used most commonly in connection with precepts that resulted from ijtihād or have been deduced from Qur'ānic verses or from isolated ḥadīth, the term 'amr is also used in some instances--such as above in -zĀIb and ANs--when there appears to be no distinction between it and the term sunnah.

Before one can conclude that there is real overlapping between the terms in Mālik's terminology, however, one must understand the content and background of the Muwaṭṭa's precepts and have been able to discern what the correct relationship is between those precepts and the terms that pertain to them. In order to do this, one must exhaust the possible hypotheses which account for Mālik's terms. It may

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[1]For discussion of the different types of ᶜamal, see above, pp. 409-433.

[2]See below, pp. 583-598, 614-690.

be, for example, that the meanings of the terms seem to overlap with each other because one has not identified the distinctive properties of each term. Furthermore, as I mentioned above, some discrepancies in Mālik's terminology may be the result of faulty transmission of the text of the Muwaṭṭa', although I doubt that such discrepancies should be very many or very great.

Nevertheless--beyond these considerations of whether or not one has identified the correct meaning of Mālik's terms or whether or not the text of the Muwaṭṭa' has been transmitted accurately--it seems to me to be expected that there should be some real overlapping between terms in Mālik's terminology. The reason for this, I believe, is that Mālik's terminology is not a systematic terminology according to the definition I have given above. Some of the words and usages Mālik employs in it are not systematic terms, properly speaking, because their semantic range has not been restricted to precise meanings. Rather, some terms in Mālik's terminology seem to fluctuate between restricted meanings which they tend to have in the context of his terminology and their old, customary semantic meanings. Thus, a word like 'amr, for example, has a very wide customary semantic range; in terms of its customary semantic range it could apply to the directive, ruling, or opinion of anyone--be it the Prophet, a judge, all the Madīnan fuqahā', or just a group of them. According to my analysis of Mālik's termi-

nology, the term 'amr is used most commonly for legal deductions that resulted from different types of ijtihād, and in certain contexts--as, for example, in the term AMN--it seems to be restricted to that meaning. Nevertheless, the word 'amr occurs in Mālik's terminology in a wide variety of contexts and takes on meanings in some of those contexts which, although within the word's customary semantic range, are contrary to its usage in other contexts. Thus, for example, the word 'amr is sometimes used in the Muwaṭṭa' for matters which probably originated in the Prophet's sunnah, as in some of the examples cited above, which are al-ᶜamal an-naqlī.

One might describe Mālik's terminology in the Muwaṭṭa', therefore, as an "emerging terminology" because of this tendency of some of the words in it to fluctuate between restricted terminological meanings and the more diverse meanings of their customary semantic range. The concept of an "emerging terminology", however, might only reflect a Western cultural bias that the proper standard of a terminology is that of a terminology which is one hundred percent systematic. Even if the notion of a completely systematic terminology had occurred to Mālik, he might have regarded it as takalluf, an unnecessarily bothersome nuisance.

In working with Mālik's terminology, therefore, one must keep in mind both the hypothetical terminological meanings that Mālik's usages may have as well as the customary

semantic meanings which they also convey. Theoretically, at least, Mālik's terms may fluctuate between these two poles. This does not mean that Mālik's terms are devoid of meaning or are equivalent in meaning; for neither the terminological or customary semantic ranges of all of his terms are identical and those same terms do not appear to be used interchangeably. For example, the sunnah terms in the Muwaṭṭa' and the term AMN seem to have distinct usages, even though other usages may overlap with them. It appears to me that Mālik's terminology is not made up of mutually exclusive terms but rather of terms that fall into inclusive and exclusive categories. For example, some of the less specific terms may include a variety of more highly qualified terms in their semantic range, while the semantic range of the more highly qualified term excludes part of the semantic range of the less specific terms. Terms in the Muwaṭṭa' are qualified by adjectives, adverbs, and other modifiers that are used with them; the more qualified a term is, the clearer and more restricted its semantic range becomes. Thus, the most exclusive and unambiguous terms in the Muwaṭṭa', I believe, are those that contain negations--like S-XN, AMN-X, and A-XN--because they explicitly exclude whatever is negated from their semantic range.

In conclusion, therefore, one must allow for some leeway in working with Mālik's terminology. To conclude that the terms he uses are interchangeable because there

is some overlapping between them would probably not be correct. But, on the other hand, it might prove to be Procrustean to attempt to fit Mālik's terms into neatly systematic and mutually exclusive categories.

General Observations about Mālik's Terms

The Use of Symbols

To begin with, I have found it practical to devise symbols for working with Mālik's terminology in the Muwaṭṭa'. These symbols make it considerably easier to manipulate Mālik's terms, which sometimes amount to being long sentences; furthermore, the symbols make the concepts and meanings in Mālik's terms stand out more clearly. Thus, they are much easier to identify, and one can determine more readily the essential semantic differences between terms. I have provided a Key to the symbols in appendix 2.

My analysis of Mālik's terminology is based on a list of the terms in the Muwaṭṭa' in appendix 1 of Nūr-Saif's thesis.[1] I have assigned each of the terms in Nūr-Saif's list a symbol and worked them into a systematic index, which is also in appendix 2. Although Nūr-Saif's list is very useful, it is not always complete or accurate. I have made emendations where I found mistakes and additions whenever I came across them. But a more thorough study of Mālik's

[1]Nūr-Saif, pp. 264-293.

terminology would require a more accurate and comprehensive index of terms. Nūr-Saif, for example, did not collect many of Mālik's usages in the Muwaṭṭa' which are quite common and which, I believe, also make up an important part of his terminology, such as: "hādhā ra'yī" [this is my opinion]; "'urā hādhā" [I am led to conclude this]; "hādhā 'aḥabb mā sami^{c}tu 'ilayya fī dhālika" [this is what I prefer of that which I have heard regarding this matter]; and "hādhā 'aḥsan mā sami^{c}tu 'ilayya fī dhālika" [this is what I regard to be best of that which I have heard regarding this matter].

Why Does Mālik Use Terms in the Muwaṭṭa'?

Although there are several hundred terms in the Muwaṭṭa' and Mālik's terminology is a conspicuous part of the book, it must also be noted that most of the precepts in the Muwaṭṭa' by far occur without any terms being used in connection with them. This brings up the question, naturally, of why Mālik uses terms in some cases and not in others.

One would assume, to begin with, that there is probably an important difference between the nature of those precepts in connection with which terms are used and those precepts with which they are not. Although I do not yet have sufficient evidence to make a conclusion, it appears that there was general agreement in and outside of Madīnah on the validity of many of those precepts for which no terms are cited. Those precepts in connection with which Mālik

uses terms, on the other hand, are generally points of difference between the Madīnan and Kūfan schools, as will be seen in the discussions of the following chapters.

The following precepts, for example, occur in the Muwaṭṭa' without any terms being used in connection with them, and, according to Ibn Rushd, they are matters of consensus among all fuqahā': Zakāh is taken on gold and silver;[1] zakāh is taken on wheat, barley, dried dates, raisins, and olives;[2] bequests [waṣāyā] may never exceed one third the value of one's entire estate.[3] Similarly, there was general consensus about what the amount of zakāh should be on camels and other livestock because of letters [kitāb aṣ-ṣadaqah] from the Prophet and later from the caliphs 'Abū Bakr and ᶜUmar on that matter. Mālik gives the text of ᶜUmar's letter in the Muwaṭṭa' and makes no comments about it.[4] According to Ibn Rushd there were differences of opinion among the Companions and Successors regarding the question of whether or not eating food that had been roasted in the open flame broke the state of ritual purity [wuḍū'], and there were contrary ḥadīth in the matter. But by Mālik's generation consensus had been reached, Ibn Rushd states, that wuḍū' was not broken in such cases and that the ḥa-

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[1]Muwaṭṭa', 1:245; Ibn Rushd, 1:147 (31).

[2]Muwaṭṭa', 1:244-245; Ibn Rushd, 1:147-148 (31).

[3]Muwaṭṭa', 2:763-764; Ibn Rushd, 2:202 (18).

[4]Muwaṭṭa', 2:257-259; Ibn Rushd, 1:152 (24).

dīth to the contrary had been abrogated. Mālik cites the position in the Muwaṭṭa' that wuḍū' is not broken in such cases but cites no terms in connection with that position.[1] Similarly, there had been disagreement among some of the early fuqahā' about whether or not it was permissible for a man who married a slave woman to also own her as personal property. Later fuqahā', according to az-Zurqānī, however, reached consensus that it was not permissible. Mālik cites that precept in the Muwaṭṭa' without any term.[2] It is interesting by way of comparison, however, that Mālik's teacher 'Abū 'z-Zinād of the generation before had referred to that same precept as "the sunnah which he had found the people following" [as-sunnah al-latī 'adraktu 'n-nās ᶜalaihā].[3]

If the hypothesis is correct that Mālik uses his terms in the Muwaṭṭa' primarily in connection with precepts regarding which there were significant differences of opinion in or outside Madīnah and that he tended not to use them in matters upon which there had been general agreement among the fuqahā', it would indicate that Mālik kept abreast of the opinions of non-Madīnan as well as Madīnan fuqahā'.[4]

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[1]Muwaṭṭa', 1:25-28; Ibn Rushd, 1:24 (19); see also ar-Rasīnī, p. 217.

[2]Zurqānī, 4:37; Muwaṭṭa', 2:537-538. [3]Mudawwanah, 2:188(20).

[4]It is worthy of note in this regard that al-Laith ibn Saᶜd in his letter to Mālik speaks of Mālik as having excellent knowledge of the points of difference between the Companions, which--according to al-Laith's view--underlie

It would not have been difficult for Mālik to learn such material since, as I pointed out in the section on his biography, Muslims visited Mālik in sizeable delegations from the different regions of the Muslim realm.[1] What would be significant about Mālik's having such knowledge, however, would be that it indicates that Mālik had taken an interest in learning the points of agreement and disagreement of non-Madīnan as well as Madīnan fuqahā' and in keeping abreast of them. It is interesting to note in this regard, furthermore, that Ibn Taimīyah holds that Mālik composed the Muwaṭṭa' with the divergent legal opinions of the Kūfans in mind and that this can be seen in the manner in which the material in the Muwaṭṭa' is presented.[2]

It would appear, therefore, that the chief purpose of Mālik's terminology in the Muwaṭṭa' is to indicate what the status of Madīnan ᶜamal is in those matters regarding which there had been differences of opinion among the fuqahā'. Thus, for example, if there has been no difference of opinion among the Madīnan fuqahā' on such a precept, Mālik states that explicitly by the expression "lā 'khtilāf fīhi" [-X; there is no difference of opinion in it], as in the terms S-XN, AMN-X, A-XN, and so forth. (I believe it likely that even in these cases Mālik did not have all of

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the differences between the ᶜamal of the various regions of the Muslim realm; see above, pp.323-331.

[1]See above, pp. 46-62. [2]Ibn Taimīyah, Ṣiḥḥat 'Uṣūl, p. 79.

the ᶜulamā' of Madīnah in mind; it is not probable, as I mentioned earlier, that he would regard some of the Madīnan ᶜulamā' as so incompetent or unreliable that he refused to even listen to their ḥadīth and described them as persons from whom no benefit could be derived and that he would then regard those same persons as legitimate constituents of 'ijmāᶜ.[1]) If there has been ijtimāᶜ on a matter in Madīnah, he indicates that by terms like AMN, which, as I suggested earlier, may signify only a majority consensus and not a total consensus of the Madīnan fuqahā' whose opinions Mālik deems to be authoritative.[2] On those matters regarding which there had been significant differences of opinion in Madīnah, Mālik cites the term AN, which, I believe, probably stands for Madīnan ᶜamal as followed by the Madīnan judiciary in those matters that came under its jurisdiction or as followed by prominent Madīnan fuqahā' like Mālik in those matters that lay beyond the jurisdiction of the judiciary.[3] Significant differences of opinion in Madīnah are even more explicit in terms, like those cited above, in which Mālik states that something is his opinion or that which he prefers or regards as best of that which he has heard.[4]

It would appear, therefore, as ᶜAlāl al-Fāsī has sug-

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[1]See above, pp. 72-76. [2]See above, pp. 424-428.

[3]See above, pp. 428-431, and below, pp. 732-734.

[4]See above, p. 530.

gested, that Mālik regarded Madīnan ᶜamal as the proper criterion to be followed in those matters of law that were derived from contrary or ambiguous sources of law and the like and regarding which there had been differences of opinion among the fuqahā'.[1] Nevertheless, it follows that if Mālik regarded Madīnan ᶜamal to be authoritative in matters of difference, he must also have regarded it to be a fundamental reference in all matters of law, since there would be no question about the validity of Madīnan ᶜamal in matters of law upon which there had been general agreement. Mālik's conception of the authoritativeness of Madīnan ᶜamal and his belief that it took priority over the contrary ᶜamal of all other regions of the Muslim realm is explicit in his letter to al-Laith ibn Saᶜd, while al-Laith, on the other hand, adheres closely to those types of Madīnan ᶜamal which are supported by local consensus, while feeling at liberty to disagree with Madīnan ᶜamal in those matters upon which the Madīnans themselves have disagreed.[2]

Mālik sets forth in the Muwaṭṭa', as mentioned earlier, the fundamental precepts of law [al-qawāᶜid al-fiqhīyah][3] of the Madīnan school, and the work, as Goldziher has observed, is, properly speaking, a compendium of law and a book of sunnah and not a collection of ḥadīth and āthār.[4] By

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[1]ᶜAlāl al-Fāsī, pp. 147, 150-151. [2]See above, pp. 304-305.

[3]For the definition of "legal precepts", see above, p.227.

[4]See above, p. 305.

setting forth these precepts, Mālik's purpose, I believe, is to make the Muwaṭṭa' a source book of Madīnan ᶜamal that can serve as the reference of those who apply the law and perform ijtihād. Although the work contains numerous instances of Mālik's own ijtihād, other works--like the Mudawwanah, "Al-Mawwāzīyah," "Al-Wāḍiḥah," and "Al-ᶜUtbīyah"--contain the main body of Mālik's personal legal reasoning regarding unprecedented and unusual circumstances, and in these works Mālik performs his ijtihād on the basis of the precepts of the Muwaṭṭa'.[1] The main purpose of Mālik's legal reasoning in the Muwaṭṭa', in contrast, is that of either defending the validity of those precepts generally accepted in Madīnah or of supporting his selection of the opinions of some of the Madīnan fuqahā' as opposed to others, in those matters upon which they have disagreed.

Just as Mālik defends the precepts of the Muwaṭṭa' by legal argument whenever he feels it necessary to do so, he seems to employ his terminology whenever he feels it is necessary because of significant differences of opinion on the precepts in connection with which those terms are used. It is noteworthy in this regard that some of Mālik's most elaborate legal arguments in the Muwaṭṭa' occur in the context of precepts for which terms are cited.[2] Mālik's use of terms primarily in matters upon which there had been dif-

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[1]See above, pp. 97-107.

[2]See below, pp. 571-575, 713-723.

ferences of opinion among the fuqahā' would seem to be in keeping with the character of Mālik's reticence. For clarification of the status of Madīnan ᶜamal in such matters would be meaningful information, so to speak, while to clarify the status of Madīnan ᶜamal in those matters upon which there had been general agreement would be somewhat redundant.

In conclusion, other prominent Madīnan fuqahā' before Mālik seem to have regarded the local consensus of Madīnah to be the criterion one should follow in matters upon which there had been differences of opinion among other fuqahā'. It is reported that the famous Madīnan qāḍī and later governor of Madīnah 'Abū Bakr ibn Ḥazm,[1] who died when Mālik was approaching thirty years of age, was once asked what one should do regarding those matters of law about which there had been differences of opinion. He replied: ". . . if you find that the people of Madīnah have reached consensus in a matter, have no doubt that it is correct [al-ḥaqq]."[2]

No doubt, Mālik must have shared this opinion regarding Madīnan ijtimāᶜ. The question, however, is what his opinion was regarding the authority of those parts of Madīnan ᶜamal that were not supported by local consensus. Mālik seems to have followed such precepts himself, and he probably regarded them--despite signficant differences of opinion about them in Madīnah--to be the best products of

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[1]For data, see above, p. 57, n. 1. [2]Wakīᶜ, 1:143-144.

Madīnan ijtihād. His letter to al-Laith ibn Sa^{c}d would indicate that Mālik felt that others should follow this type of ^{c}amal as well. Nevertheless, we do not know what Mālik's response was when he received al-Laith's justification of his having disagreed with types of Madīnan ^{c}amal that were not supported by local consensus. Furthermore, one must keep in mind the reports that Mālik opposed al-Manṣūr's suggestion that he force the people of his empire to follow the Muwaṭṭa' as a standard code of law.[1] Furthermore, one wonders why, if indeed Mālik did regard all parts of Madīnan ^{c}amal to be equally authoritative, he should have made the distinction in his terminology--which, I believe, is quite clear--between those parts of Madīnan ^{c}amal that are supported by local consensus and those that are not. Perhaps, as ^{c}Iyāḍ and al-Qāḍī ^{c}Abd-al-Wahhāb hold, these were types of ^{c}amal which Mālik himself regarded as authoritative but which he did not regard it as obligatory for others to follow.[2]

What Mālik Is Reported to Have Said about His Terms

The fullest statement which I found on Mālik's terminology in the Muwaṭṭa' was a report that ^{c}Iyāḍ transmits from a nephew of Mālik named Ibn 'Abī 'Uwais.[3] In this re-

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[1]See above, pp. 99-102, 392-394. [2]See above, pp. 409-419.

[3]^{c}Iyāḍ, 1:194.
'Ismā^{c}īl ibn ^{c}Abd-Allāh ibn 'Uwais ibn Mālik al-'Aṣbaḥī (d. 226/840), known as IBN 'ABĪ 'UWAIS, outlived Mālik by about forty-seven years and may have been of about the

port Ibn 'Abī 'Uwais states that Mālik was asked once what he meant in the Muwaṭṭa' by the expressions AMN [al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā], "bi-baladinā" [in our city], "ad-raktu 'ahl al-ᶜilm" [I found the people of knowledge (following this)], and "samiᶜtu baᶜḍ 'ahl al-ᶜilm" [I heard some of the people of knowledge transmit . . .]. Mālik is said to have replied:

> As for most of that in the book [i.e., the Muwaṭṭa'] which is ra'y, upon my life, it is not my ra'y ["'ammā 'akthar mā fī 'l-kitāb fa-ra'y, fa-la-ᶜamrī, mā huwa ra'yī"] but rather [it is] that which I have heard transmitted from several [ghair wāḥid] of the people of learning and excellence and the 'imām's whose examples are worthy of being followed, from whom I received my learning: They were people who were heedful of God. But it became burdensome for me [to mention their names] so I said, "ra'yī" [(this is) my opinion], and [I said] that whenever their ra'y was like the ra'y which they had found the Companions following and which I later found [my teachers] following. It is a legacy which one generation has handed down to another until our own time.
>
> That for which [I have used] "'urā" [I am led to conclude] is the ra'y of a grouping [jamāᶜah] of the 'imām's of earlier times.
>
> That for which [I have used] "al-'amr al-mujtamaᶜ ᶜalaihi" [that matter upon which there is ijtimāᶜ] constitutes opinions of the people of learning in fiqh and knowledge upon which ijtimāᶜ has been reached without their having differed in them ["mā 'jtumiᶜa ᶜalaihi min qawl 'ahl al-fiqh wa 'l-ᶜilm, lam yakhtalifū fīhi"].
>
> That for which I have said "al-'amr ᶜindanā" [AN] is the ᶜamal which the people among us here [an-nās

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same age as ash-Shāfiᶜī or Saḥnūn. He transmitted from his father, a brother named 'Abū Bakr, and Mālik ibn 'Anas, his paternal uncle. Al-Bukhārī and Muslim are said to have transmitted some ḥadīth from Ibn 'Abī 'Uwais, although there were muḥaddith's who regarded him as a weak transmitter. It is said, for example, that Ibn 'Abī 'Uwais used to have to rely upon his books while transmitting ḥadīth or, in other words, did not have a reliable memory. Ibn Ḥajar, 1:310-312.

> ᶜindanā] have been following. Rulings are handed down in accordance with it ["jarat bihī 'l-'aḥkām"], and both those who are ignorant and knowledgeable know what it is.
>
> Similarly, that for which I have said "bi-baladinā" [in our city] or for which I have said "baᶜḍ 'ahl al-ᶜilm" [some of the people of knowledge] is what I regarded to be preferable of the opinions of the ᶜulamā' ["fa-huwa shai' istaḥsantuhū fī qawl al-ᶜulamā'"].
>
> As for that which I did not hear transmitted from the ᶜulamā', I performed ijtihād and took into consideration the madhhab [school; tradition] of those I had known, until [my conclusion] came to the point of being correct ["ḥattā waqaᶜa dhālika mawḍiᶜ al-ḥaqq"] or near to it; [I did this] so that there be no departure from the madhhab and the legal opinions [ārā'] of the people of Madīnah, even if I had not heard [the matter] transmitted specifically. Thus, I attributed the ra'y to myself after having performed ijtihād on the basis of the sunnah and that which had been closely followed [maḍā ᶜalaihi] by the people of knowledge whose examples are worthy of being followed and on the basis of those matters which are part of the ᶜamal here ["wa 'l-'amr al-maᶜmūl bihī ᶜindanā"] from the time of the Messenger of God--may God bless him and give him peace--the rightly guided 'imām's [al-'a'immah ar-rāshidīn], and those whom I knew. So even it is their ra'y, and I did not turn to the ra'y of others.[1]

If accurate, this report would disprove the hypothesis I suggested earlier that AMN might not have stood for a total Madīnan consensus but rather for a majority consensus, while terms like AMN-X, A-XN, S-XN, and so forth, which explicitly negate the existence of differences of opinion, would stand for total consensus.[2] Mālik states in this report that he uses AMN for matters upon which there had been no differences of opinion among the people of learning in fiqh and knowledge [ᶜilm]. As I mentioned earlier, I know of no evidence in the Muwaṭṭa' for differences of opinion among the Madīnan fuqahā' on precepts in connection with

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[1]ᶜIyāḍ, 1:194. [2]See above, pp. 424-428.

which Mālik uses the term AMN. There is often textual evidence in the Muwaṭṭa', on the other hand, for differences of opinion on AN precepts. I had suggested this hypothesis because of ash-Shāfi^{c}ī's contentions that there had often been differences of opinion among the Madīnan fuqahā' on precepts for which Mālik used the terms AMN and AN and because of the positions of ^{c}Alāl al-Fāsī and Muṣṭafā az-Zarqā that the original conception of 'ijmā^{c} had probably been that of a majority and not a total consensus.[1] If this report is authentic, however, it would seem probable to me that the differences of opinion which ash-Shāfi^{c}ī has in mind with regard to AMN are those of persons whom Mālik did not regard to be worthy of being constituents of 'ijmā^{c}, since ash-Shāfi^{c}ī conceives of 'ijmā^{c} as a total consensus of the people such that you find no one disagreeing.[2] To answer the question more conclusively, one would have to know who the persons were who disagreed with the AMN's that ash-Shāfi^{c}ī has in mind; one could then determine whether they were persons whose legal opinions Mālik regarded as worthy of being considered and, hence, whether or not they would have constituted constituents of 'ijmā^{c} for him.

One of the interesting indications of this report is that it indicates that AMN pertained to opinions [qawl] of the Madīnan fuqahā'. In that regard, it supports my hy-

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[1]See above, pp. 195-204, 343-348.

[2]See above, pp. 195-204.

pothesis that AMN pertains to precepts that were derived from the ijtihād of the fuqahā' or taken from Qur'ānic texts directly but that were not part of the Prophetic sunnah as reflected in the sunnah terms of the Muwaṭṭa'.[1]

It is also noteworthy that the report identifies AN as standing for precepts that constitute Madīnan ᶜamal and which constitute the judicial custom of the Madīnan judiciary. They are also precepts which are well-known to all, both the ignorant and the learned, which one would expect of judicial policies. Mālik does not indicate that there had been differences of opinion among the Madīnan ᶜulamā' on AN precepts; however, as already mentioned, there is evidence of that in the Muwaṭṭa' itself just as there is other evidence that AN precepts constituted the judicial policy of the Madīnan judiciary.[2] It is possible for the learned people of Madīnah to know these AN precepts well and yet not have consensus on their validity because, as policy of the judiciary, they are supported by executive authority. Thus, they become ᶜamal for all, even for those who disagree. Because of this relationship between AN precepts and the Madīnan judiciary, I have suggested that AN precepts which did not come under its jurisdiction would be likely in some cases to have a mixed ᶜamal in Madīnah, that is, an ᶜamal in which some people follow the AN and others follow the

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[1]See below, pp. 576-582, 723-731; above, 419-433.

[2]See above, pp. 428-431; below, pp. 732-734.

contrary opinions of the dissenting Madīnan fuqahā'.[1]

One should also take note of Mālik's claim in this report that in doing ijtihād regarding unprecedented matters he has adhered as closely as possible to the well-established sunnah and the precepts of law to which the Madīnans have traditionally subscribed and which make up their ᶜamal. Indeed, one of the most conspicuous characteristics of the report is Mālik's emphasis in it that his legal opinions are neither original nor have they been taken from non-Madīnan sources but rather that invariably they are either rooted in the Madīnan tradition--in that they were also the opinions of earlier Madīnan fuqahā' from whom Mālik received his learning--or that they were modelled after that tradition in the case of ijtihād. If there is any reason to suspect the authenticity of the report on the basis of its content, I would think it would be Mālik's insistence upon this point. For it is plausible that a later Mālikī fabricated the report in order to lend greater authoritativeness to statements of Mālik in the Muwaṭṭa' like "hādhā ra'yī" and "'urā hādhā" which would not otherwise appear so authoritative. (Similarly, one might suspect that the statement that AMN constitutes a total consensus of the Madīnan fuqahā' was fabricated to lend greater authoritativeness to AMN than it would have if it were understood to stand for a majority consensus.)

Nevertheless, it is also plausible that these state-

ments in the report are authentic. What Mālik is reported to have said about his ra'y statements in the Muwaṭṭa' is not essentially different from my analysis of the significance of his term AN. For with regard to these statements about ra'y, Mālik has stated that his personal ra'y in most cases is in keeping with the ra'y of several [lit., more than one] of the prominent Madīnan fuqahā' before him. He indicates by this that these matters constituted points of difference among the Madīnan fuqahā', namely, that there were others of them from whom he heard opinions to the contrary. (Similarly, Mālik's statement later in the report about his following those opinions of the fuqahā' which he regarded to be preferable also indicate such differences of opinion; there must have been contrary opinions which he regarded as not preferable.)

If terms in the Muwaṭṭa' like hādhā ra'yī and 'urā hādhā refer to opinions of Mālik that are in keeping with the opinions of some of the prominent Madīnan fuqahā' before him as opposed to others, this brings up the question of what the distinction, if any, is between these terms and Mālik's AN. As I mentioned earlier, I have not been able to undertake a systematic study of the ra'y terms of the Muwaṭṭa' and the terms expressing Mālik's personal preferences. Occasionally, Mālik speaks of something being his personal preference in the case of an AN,[1] however, as a

[1]See, for example, Muwaṭṭa', 2:502, 661.

rule the ra'y terms and the terms expressing personal preference seem to occur in isolation from the sunnah and 'amr terms.

If--as Mālik states in this report and as is supported by my analysis of Mālik's terminology--AN terms refer to the ᶜamal of the Madīnan judiciary in matters that come under its jurisdiction, the question arises as to whether or not the precepts of Mālik's ra'y terms also represent that same ᶜamal. One hypothesis that comes to mind is that Mālik may have used the AN terms for those precepts with which he agreed that were part of Madīnan ᶜamal yet upon which there had been differences of opinion among the Madīnan fuqahā', while he used his ra'y terms to designate precepts which he regarded to be valid or preferable and upon which there had been differences among the Madīnan fuqahā' that were not supported by Madīnan ᶜamal.

A Few Words about Terms in the Mudawwanah

Legal terms similar to those which Mālik uses in the Muwaṭṭa' are also to be found in the Mudawwanah. In the Mudawwanah, however, these terms come from a wide variety of sources and through various channels of transmission--often, for example, they make up part of the additional information which Saḥnūn himself has added to the original text of Ibn al-Furāt and Ibn al-Qāsim.[1] The terms in the Muwaṭṭa', on

[1]See above, pp. 107-113.

the other hand, come from one source--Mālik--and through one channel of transmission--that of Yaḥyā ibn Yaḥyā al-Laithī.[1] Although most of the terms which I found in the Mudawwanah come from Mālik,[2] there are also terms from teachers of Mālik like az-Zuhrī, Yaḥyā ibn Saᶜīd, Rabīᶜah, 'Abū 'z-Zinād,[3] and Ibn Qusaiṭ.[4] I have also found a few terms attributed to 'Ashhab and Ibn al-Qāsim.[5]

Because of the several persons from whom these terms come, it is probably not proper to speak of a terminology of the Mudawwanah but rather of the terminologies of the

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[1]See above, pp. 97-107.

[2]See, for example, Mudawwanah, 1:24 (2), 40 (8), 68 (2, 5, 10, 13), 70 (9), 96 (12), 99 (23), 102 (14), 103 (7), 112 (12), 119 (1, 5), 125-126 (21), 141 (9), 142 (3), 146 (2), 152 (24), 157 (9, 15), 194 (10), 195 (12, 15), 209 (3), 231 (3), 242 (10), 257 (13), 281 (29), 282 (16), 289 (9), 293-294 (30), 296 (25); 2:142 (9), 149 (10), 160 (9), 210 (8), 397 (2); 3:113 (17), 215-216 (19); 4:70 (18), 70-71 (32), 77 (22), 106 (3), 412 (15).

[3]For az-Zuhrī, see ibid., 1:150 (17), 287 (7); 2:386 (5), 395 (24); 4:84 (10), 120 (4), 121 (26). For Yaḥyā ibn Saᶜīd, see ibid., 1:287 (7), 2:194 (15), 395 (24); 3:84 (22), 96 (30), 129 (17); for Rabīᶜah, see ibid., 1:194 (16), 3:96 (30), 129 (17); for 'Abū 'z-Zinād, see ibid., 2:188 (20).
For data on these persons, see above, p. 55, n. 4 [az-Zuhrī], p. 63, n.2 [Yaḥyā ibn Saᶜīd, Rabīᶜah, 'Abū 'z-Zinād].

[4]Ibid., 1:110 (13); 2:188 (20).
Yazīd ibn ᶜAbd-Allāh IBN QUSAIṬ (32-122/652-739) was one of Mālik's teachers and also instructed al-Laith ibn Saᶜd. He transmitted from Ibn ᶜUmar and Saᶜīd ibn al-Musayyab, Khārijah ibn Zaid, and ᶜUrwah ibn az-Zubair of the Seven Fuqahā'. Mālik cites Ibn Qusaiṭ occasionally in the Muwaṭṭa'. Ibn Qusaiṭ was also regarded as being a faqīh and is said to have been very genial and helpful. See Ibn Ḥajar, 11:342-343.

[5]Mudawwanah, 1:241 (16) and 2:197 (22), 369 (23). For data on 'Ashhab, see above, p. 108, n. 2; for Ibn al-Qāsim, see above, p. 42, n. 2.

Mudawwanah. It would be interesting to study the terminologies of these different persons in the Mudawwanah as well as Mālik's terminology in that work and compare them with his terminology in the Muwaṭṭa'. That would require first, however, that these terms be collected and classified; until this time, unfortunately, the Mudawwanah, like most early Arabic works, has not been properly indexed.[1] I recorded the terms of the Mudawwanah whenever I encountered them in my readings, and--not having been able to go through the entirety of the Mudawwanah--I read selectively in each of its volumes, with the hope that the information I gathered would be random enough to give a fair sampling of the work's contents. Although I have not attempted to analyze the terminologies of the Mudawwanah, I make occasional references to terms in it in the context of the following discussion of the terminology of the Muwaṭṭa', especially when there are noteworthy discrepancies between terms used in both books for the same or similar precepts.

ᶜAmal terms--which are not very common in the Muwaṭṭa', compared to the 'amr and sunnah terms it contains--are

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[1]The best attempt at indexing the Mudawwanah which I know of to date is that of G.-H. Bousquet, who has prepared a general subject index of the work. As he admits himself, however, even this index is still very general. See G.-H. Bousquet, "La Mudawwana: Index avec la table générale des matières," Arabica, 17:113-150. Bousquet's index is based on the following edition: Saḥnūn ibn Saᶜīd, Al-Mudawwanah al-Kubrā li-'Imām Dār al-Hijrah, al-'Imām Mālik ibn 'Anas al-'Aṣbaḥī, 16 vols. in 8 (Egypt: Maṭbaᶜat as-Saᶜādah, 1323/1905); I refer to this edition as: Mudawwanah (Saᶜādah) to distinguish it from the Khairīyah edition.

more frequent in the Mudawwanah; most of them seem to be of the category of what I call "negative ᶜamal terms" [Al-x̄], which, in contrast to the "affirmative ᶜamal terms", state that ᶜamal is not in accordance with the procedure or precept in question.[1] There are also many sunnah and 'amr terms in the Mudawwanah. I found a higher incidence of sunnah terms in the Mudawwanah than 'amr terms, while in the Muwaṭṭa' the majority of terms by far are 'amr terms. Of the 'amr terms in the Mudawwanah, AN is the most common of those which I found, which is also the case in the Muwaṭṭa'. I found an example of Mālik's term A-XN but no examples of the term AMN, which is the second most common term in the Muwaṭṭa'.[2]

I found some terms which are worthy of note that occur in the Mudawwanah and are sometimes used by Mālik but which do not occur in the Muwaṭṭa': al-'amr al-qadīm [the ancient 'amr],[3] 'amr an-nās al-qadīm [the ancient 'amr of the people],[4] 'amr an-nabī [the 'amr of the Prophet],[5] and ash-sha'n, which is a synonym for 'amr.[6] 'Amr an-nabī illustrates how, as I mentioned earlier, the semantic scope of 'amr can take in the Prophet as well as others.[7]

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[1]For discussion of the ᶜamal terms, see below, pp. 614-690.

[2]Mudawwanah, 4:106 (3); Mālik is the source of the term.

[3]Ibid., 1:193 (23); 4:76 (8). [4]Ibid., 1:146; 4:77 (22).

[5]Ibid., 1:293 (30).

[6]Ibid., 1:24, 68, 102 (14), 194 (14), 195 (15), 281 (29).

[7]See above, pp. 526-527.

CHAPTER VII

THE SUNNAH TERMS

General Observations about the Sunnah Terms

According to my analysis, there are forty sunnah terms in the Muwaṭṭa', and I have divided them into five main classifications.[1] The first and numerically largest of these classifications is that of the sunnah terms like S-XN [as-sunnah al-latī lā 'khtilāf fīhā ᶜindanā; the sunnah regarding which there are no differences of opinion among us] and its variations, which indicate that they were supported by Madīnan 'ijmāᶜ, by explicitly denying any differences of opinion among the Madīnans on them. I have recorded thirteen sunnah terms which fall into this classification. The second of these classifications is that of MḌS [maḍat as-sunnah; the sunnah (which) has been executed, put into practice] and variations of it which include the verb "maḍā" or its derivatives. I have placed eight sunnah terms in this classification; there is a ninth instance of it--MḌS-XN [maḍat as-sunnah al-latī lā 'khtilāf fīhā ᶜindanā; the sunnah (which) has been put into practice and upon which there

[1]See below, pp. 778-779 of appendix 2 for the index of these five classifications.

are no differences of opinion among us]--which, however, I have classified with the S-XN terms because of its explicit indication of 'ijmāᶜ.

The third classification is that of SMs [sunnat al-muslimīn; the sunnah of the Muslims] and its variations. I have recorded five instances of this expression in the Muwaṭṭa'; in one of these instances--SMs-X [sunnat al-muslimīn al-latī lā 'khtilāf fīhā; the sunnah of the Muslims upon which there are no differences of opinion]--I have classified it with the S-XN terms; in another instance--MḍSMs [maḍat sunnat al-muslimīn; the sunnah of the Muslims (which) has been put into practice]--I have classified it with the MḍS terms. The fourth classification is that of SN [as-sunnah ᶜindanā; the sunnah among us], which occurs nine times without variation. A variation of it--SN: x̄dIb [as-sunnah ᶜindanā wa 'l-ladhī 'adraktu ᶜalaihi 'ahl al-ᶜilm bi-baladinā; the sunnah among us and that which I found the people of knowledge in our city following]--occurs only once, according to my analysis. The fifth classification is that of S [as-sunnah], which occurs six times.

The highest percentage of sunnah terms occurs in the chapter on zakāh. In general, however, the forty sunnah terms are distributed throughout the Muwaṭṭa', occurring both in chapters that pertain to acts of worship and to social transactions. MḍS and SMs, however, occur only in chapters pertaining to social transactions. Conclusions about

the significance of the sunnah terms are given at the end of this chapter.[1]

The expression "sunnat Rasūl Allāh" [the sunnah of the Messenger of God] never occurs among Mālik's sunnah terms in the Muwaṭṭa'. That expression occurs twice in the āthār of the Muwaṭṭa', however, and the variation sunnat an-Nabī [the sunnah of the Prophet] occurs in a ḥadīth. The caliph 'Abū Bakr states that he knows of no stipulated share of inheritance for grandmothers in the sunnah of the Messenger of God.[2] ᶜAbd-Allāh ibn ᶜUmar writes to the 'Umayyad ruler ᶜAbd-al-Malik ibn Marwān, informing him that he will hear and obey him in a manner consistent with the sunnah of God and the sunnah of God's Messenger.[3] Mālik narrates a ḥadīth, according to which the Prophet says, "I have left two things with you which, if you follow them, you will never go astray: the Book of God and the sunnah of His Prophet."[4]

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[1]See below, pp. 576-582. [2]Muwaṭṭa', 2:513.

[3]Ibid., 2:983.

[4]Ibid., 2:899.

Six other reports in the Muwaṭṭa' contain the word sunnah or derivative verbs. In one ḥadīth the Prophet errs while leading the community in prayer and institutes the sunnah of making two additional prostrations to compensate for inattention while praying; the Prophet says, "I am made to forget ['unassā or 'ansā] in order that I establish a [new] sunnah ['asunna]" (ibid., 1:100). In an 'athar ᶜĀ'ishah, the Prophet's wife, says that three sunnah's were established in the case of a certain woman named Barīrah; she then ennumerates them (ibid., 2:562). ᶜUmar ibn al-Khaṭṭāb, while speaking to the people, tells them that the sunnah's have been clearly set down for them and that they have been left on the clear path [al-wāḍiḥah] (ibid., 2:824). The Companion ᶜAbd-

Examples

1. S-XN: Zakāh on Gold and Silver

> Mālik states that it is the S-XN that zakāh is required on twenty pieces of gold [dīnār] and on two hundred pieces of silver [dirham].[1]

There was extensive agreement among fuqahā' in Madīnah, Kūfah, and elsewhere on the validity of this precept. Al-Ḥasan al-Baṣrī, however, disagreed on part of it, holding instead that the minimum amount [niṣāb] of gold coin upon which zakāh was due was forty pieces, and a small party held that view with him, according to Ibn Rushd, although al-Bājī states that after al-Ḥasan total consensus was reached on the validity of the above precept.[2]

According to Ibn Rushd, Mālik has derived this precept from the ᶜamal of Madīnah, which he believes to be in-

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ar-Raḥmān ibn ᶜAwf reports that he heard the Prophet say that the sunnah pertaining to the People of the Book [i.e., Jews and Christians] should be followed in the case of Magians (ibid., 1:278). ᶜUmar ibn al-Khaṭṭāb refuses to wash the garment he is wearing after it has been somewhat defiled and decides instead to clean the defiled part with water while still wearing it, for he fears that if he changed garments in order to have the defiled one washed people would regard it to be required by sunnah (ibid., 1:50). Az-Zuhrī states that people are mistaken about the sunnah when they think it is sunnah to walk behind funeral processions (ibid., 1:226). See A. J. Wensinck, Concordance et indices de la tradition musulmane: les six livres, le Musnad d'al-Dārimī, le Muwaṭṭa' de Mālik, le Musnad de Aḥmad ibn Ḥanbal, 7 vols. (Leiden: E. J. Brill, 1937-1943), 11:552-558.

See also, pp. 11-20, above on the discussion of the difference between concepts and terms.

[1] Muwaṭṭa', 1:246. [2] Al-Bājī, 2:95; Ibn Rushd, 1:150 (20).

dicated by Mālik's term S-XN.[1] The type of ᶜamal represented by this precept is what is called in Mālikī legal theory "al-ᶜamal an-naqlī", i.e., ᶜamal that was either instituted by the Prophet directly or which had his approval.[2] For the Prophet directed his regional governors to collect zakāh and must have indicated to them what the minimum quantities of gold and silver coin were upon which it was to be collected. Ibn al-Qāsim states in the Mudawwanah that this precept is "sunnah māḍiyah" [a sunnah which was executed and put into practice].[3]

This is an example also of a very authoritative type of Madīnan ᶜamal for which there are few if any ḥadīth that are regarded to be sound. Mālik cites no ḥadīth or āthār to support it. Ibn Rushd states that the niṣāb of silver coins is established in authentic ḥadīth but that there is no sound ḥadīth supporting the niṣāb on gold coin. Al-Bājī indicates the same thing. He cites the unsound ḥadīth in question--which is in conformity with Mālik's precept--but adds that its 'isnād is not sound.[4]

It should also be noted that, according to the Madīnan point of view, there is no analogy between the amount of gold upon which zakāh is paid and the amount of silver. For, although the ratio between gold and silver according to this precept would be one to ten, the Madīnans hold that

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[1]Ibn Rushd, 1:150 (20). [2]See above, pp. 410-415.

[3]Mudawwanah, 1:209 (3). [4]Ibn Rushd, 1:150 (20); al-Bājī, 2:95.

the true ratio between gold and silver currencies is one to twelve. Ash-Shāfiᶜī states that when debating with ash-Shaibānī about this and related matters; for ash-Shaibānī holds that the true ratio between gold and silver is one to ten, as reflected in this precept, and he believes that the Madīnans are contradictory in establishing a one to twelve ratio between gold and silver in indemnities [diyāt]. Ash-Shāfiᶜī explains that, for the Madīnans, the one to twelve ratio is the norm,and they follow it in pertinent matters of law, while they regard the one to ten ratio in zakāh to be contrary to analogy, just as they do not believe there to be any analogy between the monetary value of the numbers of cattle, sheep, camels, and other livestock upon which zakāh is collected.[1]

In the discussion which follows this precept, Mālik makes it clear that for purposes of zakāh gold and silver currencies are to be regarded independently and not in terms of their values with respect to each other. Thus, he states that if a person possesses 160 pieces of silver in a city where the rate of exchange between gold and silver coins is one to eight--thereby making that person's 160 silver coins worth twenty pieces of gold--that person, nevertheless, shall only be required to pay zakāh on his silver when it reaches the number of 200 coins.[2] He emphasizes, however, that the

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[1]Ash-Shāfiᶜī, "Radd," pp. 277-279; for examples, see Muwaṭṭa', 2:833, 850.

[2]Muwaṭṭa', 1:247.

size of the coins must be standard; zakāh would not be required, for example, on twenty pieces of gold of deficient weight or 200 pieces of silver of deficient weight.[1]

2. S-XN . . . : No Zakāh on Fruit, Provender, and Greens[2]

> Mālik cites the term and states the precept that zakāh is not levied on any types of fruit [fawākih], such as pomegranates, peaches, figs, and so forth.
> He continues to say that zakāh is also not levied on freshly mown provender [al-qaḍb] or any types of edible greens [buqūl] nor on the money earned from selling them until that money has been in one's possession for a full year [ḥawl].[3]

This precept is an instance of what Mālikī legal theorists refer to as al-ᶜamal an-naqlī, which, in this case, is believed to have come about by virtue of the Prophet's tark, that is, his not having required something which, had he required it, would have become well-known to the people of Madīnah. ᶜIyāḍ cites it as an illustration of that type of ᶜamal naqlī.[4] Ibn ᶜAbd-al-Barr and al-Bājī also hold this view, pointing out, like ᶜIyāḍ, that Madīnah was an agricultural oasis in which these types of produce constituted common crops; thus, it would have been well-known to the Madīnans if the Prophet had levied zakāh on such crops.[5]

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[1]Muwaṭṭa', 1:246-247.

[2]The term in full is S-XN: stx]I [as-sunnah al-latī lā 'khtilāf fīhā ᶜindanā wa 'l-ladhī samiᶜtu min 'ahl al-ᶜilm; the sunnah upon which there are no differences of opinion among us and that which I have heard transmitted from the people of knowledge].

[3]Muwaṭṭa', 1:276. [4]See above, pp. 410-415.

[5]Yūsuf IBN ᶜABD-AL-BARR, Al-Istidhkār, ed. ᶜAlī an-

Although Mālik states in the full term which he uses for this precept that he has heard it from the people of knowledge in Madīnah, he cites no textual sources of law, such as ḥadīth or āthār to support its validity. Ash-Shawkānī[1] states that very little textual information has been transmitted about this precept; he adds that at-Tirmidhī,[2] the famous third/ninth century muḥaddith held that no sound ḥadīth had been transmitted regarding this precept.[3] Thus, it is another very fundamental part of Madīnan ᶜamal naqlī about which few if any ḥadīth had been transmitted.

This precept is also a point of difference between the Madīnans and 'Abū Ḥanīfah, who holds that zakāh is required on the produce of all fruit trees--whether or not the fruit is storable--and that zakāh is required on edible greens [buqūl].[4] According to Ibn Rushd, 'Abū Ḥanīfah bases

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Najdī Nāṣif, 2 vols. [incomplete] (Cairo: Al-Majlis al-'Aᶜlā li-'sh-Shū'ūn al-'Islāmīyah, 1391-/1971-), 1:154; Al-Bājī, 2:170.

[1]Muḥammad ibn ᶜAlī ASH-SHAWKĀNĪ (1173-1250/1760-1834) was an important Yamanī Muslim scholar from Ṣanᶜā', where he became qāḍī in 1229/1813. He wrote at least 114 books and was much concerned with the revival of Islamic learning and practice; he was an adamant opponent of taqlīd [the unthinking imitation of tradition]. Ziriklī, 7:190-191.

[2]Muḥammad ibn ᶜĪsā AT-TIRMIDHĪ (205-279/825-892) was a famous Central Asian muḥaddith and student of al-Bukhārī. His compilation--Al-Jāmiᶜ--is highly regarded among sunnī's. He is especially important because of his method of criticizing 'isnād's and because of the terminology he used in classifying them. Sezgin, 1:154.

[3]Muḥammad ibn ᶜAlī ASH-SHAWKĀNĪ, Nail al-'Awṭār min Ḥadīth Sayyid al-'Akhyār: Sharḥ Muntaqā 'l-'Akhbār, 9 vols. (Beirut: Dār al-Jīl, 1973), 4:203-204.

[4]Al-Bājī, 2:170.

his position on the generality [ᶜumūm] of a ḥadīth--which Mālik also transmits in the Muwaṭṭa'[1]--namely, "[Take] ten percent of that which is watered by the sky, springs, and ground water [al-baᶜl]; five percent from that which is irrigated;" for, according to the generality of this statement, zakāh would be required on all agricultural produce.[2] Thus, Mālik's precept is an exception to this general statement and is contrary to analogy with other types of agricultural produce upon which Mālik holds that zakāh is required.

3. SthN-X:[3] Regarding Bequests to One's Heirs

> Yaḥyā ibn Yaḥyā begins by stating that he has heard Mālik say that the Qur'ānic verse, ". . . if one leaves wealth behind [him after death], [let him make] bequests [waṣīyah] to parents and relatives . . ."[4] was abrogated upon the revelation of the other verses in the Qur'ān which established the shares of inheritance which parents and relatives must receive.[5] Yaḥyā then continues to say that he has heard Mālik say that it is the SthN-X that it is not permissible for a person to make a bequest to an heir of his unless his other heirs permit him to do so. If some of them permit it and others refuse to, the bequest will be taken from the shares of inheritance of those who permitted it but not from the shares of those who did not.[6]

This precept is believed to be another instance of ᶜamal naqlī which was instituted by the Prophet and had been part of Madīnan ᶜamal since the days of the Prophet's Com-

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[1]Muwaṭṭa', 1:270. [2]Ibn Rushd, 1:149 (14).

[3]This symbol stands for the expression, "as-sunnah ath-thābitah ᶜindanā al-latī lā 'khtilāf fīhā" [the well-established sunnah among us, concerning which there are no differences of opinion].

[4]Qur'ān, 2:180. [5]Ibid., 4:7, 11-12, 176.

[6]Muwaṭṭa', 2:765.

panions, as indicated by Ibn Rushd, al-Bājī, and az-Zurqānī.[1] There was wide-spread agreement among the sunnī fuqahā' regarding the first part of Mālik's precept about bequests not being made to heirs and that the Qur'ānic verse to that effect had been abrogated. According to az-Zurqānī, however, the Yamanī faqīh Ṭāwūs[2] and others held that the verse had not been abrogated but rendered specific [makhṣūṣ] upon the revelation of the verses setting forth the shares of inheritance and that it pertained to giving bequests to those relatives who were not heirs.[3] (Not all relatives receive shares of inheritance.) Furthermore, according to al-Bājī, Ibn Rushd, and az-Zurqānī, there was some disagreement about the validity the the provision at the end of this precept, namely, that bequests could be made to heirs from the shares of other heirs who were willing to permit it. Al-Bājī does not state who disagreed on this point; Ibn Rushd and az-Zurqānī, on the other hand, mention Dāwūd aẓ-Ẓāhirī and al-Muzanī,[4] who reached manhood sometime after Mālik's death. I

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[1]Ibn Rushd, 2:201 (30); al-Bājī, 6:179; az-Zurqānī, 4:482.

[2]ṬĀWŪS ibn Kaisān al-Khawlānī (33-106/653-724) was a highly regarded older Successor and was renowned for his knowledge of ḥadīth and fiqh. He was of Persian ancestry but was born in Yaman and grew up there. He was known for his piety and his aversion to the patronage of the 'Umayyads, whom he is reported to have often admonished. Ziriklī, 3:322.

[3]Az-Zurqānī, 4:482; see al-Bājī, 6:179; Ibn Rushd, 2:201 (30).

[4]For data on al-Muzanī, see above, p. 210, n. 1. DĀWŪD ibn ᶜAlī ibn Khalaf AẒ-ẒĀHIRĪ (200 or 202-270/

do not know whether this difference of opinion began with Dāwūd aẓ-Ẓāhirī and al-Muzanī or went back before them.

There is a ḥadīth supporting the first part of the precept, namely, that bequests are not to be made to heirs, and it has been transmitted through several channels, although, according to al-Bājī and az-Zurqānī, there has been some question about the soundness of these channels of transmission. Al-Bājī states that despite differences of opinion over the validity of this supporting ḥadīth the fuqahā' have always been in wide-spread agreement about this ᶜamal. Az-Zurqānī mentions a ḥadīth supporting the last part of the precept about the permissibility of making such bequests from the shares of those heirs who permit it, but he adds again that there is doubt about the soundness of that ḥadīth's transmission.[1] There is no mention in these works of contrary ḥadīth; it would seem, then, that this is another example of a well-established ᶜamal regarding which few ḥadīth were transmitted.[2]

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815 or 817-884) was the founder of the so-called "Ẓāhirī" or literalist school of law; he was born in Kūfah, studied in Baṣrah and Baghdād and Nīsāpūr, and settled in Baghdād. One of the notable features of his school was the rejection of qiyās and all other types of ra'y. Sezgin, 1:521.

[1]Al-Bājī, 6:179; az-Zurqānī, 4:482.

[2]In so far as the contrary opinions of Dāwūd aẓ-Ẓāhirī and al-Muzanī are concerned, they are not, according to Ibn Rushd, based on contrary ḥadīth but rather on the literal interpretation of the ḥadīth referred to above that "bequests shall not be made to heirs." The reasoning of Mālik and those who uphold the precept, according to Ibn Rushd, al-

Laws pertaining to bequests are contrary to analogy with other rights that one has in Islamic law over the disposal of one's property. Ordinarily one is free to dispose of one's property as one sees fit and to make gifts of it to whomever one wants. This is clearly not the case in the laws of bequests.

Finally, it would appear that Mālik has relied upon the Madīnan ᶜamal that supports this precept as a means of establishing that the Qur'ānic verse pertaining to making bequests to parents and relatives had indeed been abrogated upon the revelation of the verses that set down the shares of inheritance. For there is nothing in those verses that explicitly indicates that the procedure of making bequests to parents and relatives had been abrogated.

4. SN: SNx̄-shkx&-X:[1] The Annulment of Marriage by Liᶜān[2]

Mālik cites a lengthy ḥadīth, which reports how the Prophet administered liᶜān; he adds the comment from az-Zuhrī after the ḥadīth that this procedure which the Prophet

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Bājī, and az-Zurqānī, is that the purpose of the prohibition is to keep the maker of the bequest from violating the rights of his heirs; Thus, if they consent to his making a bequest to another heir at their expense, it is permissible. Ibn Rushd states that the contrary opinion regards the prohibition as having no purpose which intellect can discern; thus, they adhere to it strictly as a matter of religious obedience. (See the citations above from Ibn Rushd, al-Bājī, and az-Zurqānī.)

[1]This symbol stands for as-sunnah ᶜindanā . . . . Wa ᶜalā hādhā as-sunnah ᶜindanā 'l-latī lā shakk fīhā wa lā 'khtilāf [SN . . . . The SN in which there is no doubt and upon which there are no differences of opinion is in accordance with this].

[2]Liᶜān [mutual cursing] is a type of annulment in the

> instituted with regard to the couple mentioned in the ḥadīth became thereafter the sunnah regarding those who do liᶜān. Mālik then transmits a shorter ḥadīth, which reports that the Prophet administered liᶜān once, divided between the husband and wife afterward, and joined the wife's child with her. Mālik then cites the Qur'ānic verses which contain the wording of the oaths which are to be taken by the husband and wife when performing liᶜān.[1]
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> Mālik states that the SN is that a husband and wife who do liᶜān may never remarry. If the husband later claims that he was lying, he shall be flogged the punishment of one who slanders women. In that case, he will be permitted to claim the child [if there is one] as his own, but he shall not be permitted to remarry his former wife. Mālik concludes by stating that the SN in which there is no doubt and upon which there are no differences of opinion is in accordance with this.[2]

Although Mālik first refers to this precept as a SN, he makes it clear by his statement at the end of the precept that it is a SN regarding which there were no differences of opinion; thus, I would classify this precept with the other S-XN precepts.

This precept, like the other sunnah precepts discussed so far, would be classified as ᶜamal naqlī because of the explicit indication in the text of the Muwaṭṭa' that it had been instituted by the Prophet. Az-Zuhrī comments on the first ḥadīth, "And so this became thereafter the sunnah regarding those who do liᶜān." Thus, the concept of sunnah which az-Zuhrī has in mind here would be that of the sunnah of the Prophet.

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case of a husband's accusing his wife of adultery but not having sufficient evidence to prove it. He takes four oaths before the qāḍī that he is speaking the truth, and he invokes the curse of God upon himself if he is lying. The wife may exempt herself from punishment by taking four contrary oaths that her husband is lying and invoking the wrath of God upon herself if he is speaking the truth.

[1]Qur'ān, 24:6. [2]Muwaṭṭa', 2:566-568.

Unlike the preceding examples, this example is supported by two ḥadīth which Mālik cites; nevertheless, the sunnah precept provides information which is not contained in Mālik's textual sources. The sunnah precept provides the additional information that a couple whose marriage has been annulled through liᶜān may never again, under any circumstances, remarry--which, according to Ibn Rushd, is a point of difference between Mālik and 'Abū Ḥanīfah. 'Abū Ḥanīfah agrees with the additional information in the precept that the husband should be given the punishment of one who slanders women, if he admits that he was lying, and he agrees, furthermore, that the child, if any, will then be regarded as that of the former husband. 'Abū Ḥanīfah contends, however, that just as the father may reclaim his child, so may he remarry his former wife. Ibn Rushd adds that others--whom he does not specify--held, not like 'Abū Ḥanīfah that he may remarry his former wife, but that she would immediately become his wife again, if he admitted to having lied and took the appropriate punishment.[1]

From Mālik's standpoint, the precept of liᶜān is contrary to analogy with the general precepts of divorce [ṭalāq], according to which there may be a period of waiting [ᶜiddah], during which the husband may decide to take his wife back in

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[1]Muḥammad ibn 'Aḥmad IBN RUSHD, Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid, 2 vols. in 1 (Cairo: Maṭbaᶜat al-Istiqāmah, 1371/1952), 2:120. This edition is cited henceforth as: Ibn Rushd, (Istiqāmah), to distinguish it from the Dār al-Kutub al-ᶜArabīyah edition.

marriage, and after which the husband may remarry his former wife again, if she consents and if it is not the third divorce. Al-Bājī notes this anomalous nature of li^cān and adds that because of it there have been some fuqahā' who classified li^cān as a type of annulment [faskh] and not a type of divorce; he disagrees with that classification, however, because even in the case of numerous types of annulments remarriage is permissible in Islamic law.[1] 'Abū Ḥanīfah and others who regard it as permissible for a former husband and wife to remarry after li^cān would regard li^cān, at least in that respect, to be analogous with divorce [ṭalāq]. It might also be noted that the precept of li^cān is contrary to analogy with the precept regarding testimony for establishing sexual infidelity, which requires a minimum of four witnesses of reputable character who actually saw the act of adultery or fornication being performed. In this case, there is only a single witness, and the wife, furthermore, may avoid punishment by taking a contrary oath. Nevertheless, as far as I know, there were no differences of opinion among the fuqahā' on this aspect of the precept of li^cān.

It should also be noted that after this sunnah precept Mālik cites two AN precepts that are connected to it and are apparently derivatives of ijtihād regarding the application of li^cān. The first of these pertains to a man's

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[1]Al-Bājī, 4:78.

performing li^{c}ān after he has divorced his wife a third and final time and learns that she is pregnant but claims that he is not the father of the child.[1] The second AN precept states that the precept of li^{c}ān pertains to wives who are Muslim slaves or free Christians or Jews just as it pertains to free Muslim wives.[2]

5. S-XN: Regarding Zakāh on Inheritance

> Mālik states that it is the S-XN that when heirs inherit commercial goods, houses, or slaves or the right to collect on debts due to the one from whom they are inheriting, they are not required to pay zakāh on the money they earn by selling such goods or on the sum of the debt when it is collected until they have had that money in their possession for a full year [ḥawl].
>
> Mālik then continues to say that it is the SN that heirs are not required to pay zakāh on money they receive as inheritance until they have had that money in their possession for a full year [ḥawl].[3]

These two precepts, the first of which is a S-XN and the second of which is a SN, are very similar, but they are not identical. The first pertains to the inheritance of types of property or the right to collect debts upon which zakāh is not due according to Mālik. The second pertains to the inheritance of types of property--gold and silver or livestock and the like--upon which zakāh is required. It is not the goods themselves or the debt upon which one pays zakāh in the first precept but rather on the money that one earns by selling the goods or by collecting the debt. Nevertheless, the two precepts are so close that it is diffi-

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[1]Muwaṭṭa', 2:568. [2]Ibid., 2:568-569.

[3]Ibid., 1:252; note: Ibn al-Qāsim refers to this S-XN as an SN. See Mudawwanah, 1:231 (3).

cult to conceive of how there could be consensus on the first--which would seem to presume the precept of the second--and not also be consensus on the second. In the absence of any evidence about differences of opinion in Madīnah on either precept, it would appear to me that S-XN and SN are used as equivalents in this example. It would be within the customary semantic range of SN to include precepts upon which there had been consensus, but it would not be within the semantic range of S-XN to stand for precepts upon which there had been no consensus among those whom Mālik regards as being the constituents of Madīnan 'ijmā^c.[1]

These precepts constitute a point of difference between Mālik and the Kūfans 'Abū Ḥanīfah and Sufyān ath-Thawrī,[2] according to Ibn Rushd. This difference goes back to a fundamental difference between the manner in which Mālik defines the wealth [māl] upon which zakāh is levied and the manner in which the Kūfans define it. The Kūfans define a person's wealth as a single unit regardless of whether or not it is made up of profits ['arbāḥ] from one's base capital [al-'aṣl] or from accretions [fawā'id]--such as inheritance, as mentioned in this example, gifts, wages, and so forth--which do not come from one's base capital. Mālik holds, on the contrary, that for purposes of zakāh a distinc-

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[1]For discussion of the overlapping between Mālik's terms and their classification into inclusive and exclusive categories, see above, pp. 419-434, 523-529.

[2]For data on ath-Thawrī, see above, p. 77, n. 1.

tion must be drawn between base capital and profits that result from utilization of it, on the one hand, and between accretions, on the other.[1]

Thus, according to the Kūfans, whenever the amount of a person's wealth reaches nisāb [the minimum amount upon which zakāh is due] that person will pay zakāh one full year [ḥawl] later on the entirety of his wealth--including recent profits or accretions--if, at that time, the entirety of one's wealth is still at the level of nisāb or above it.[2] From this point of view, the Kūfans would hold contrary to Mālik's S-XN and SN precepts in this example that the accretions one receives by way of inheritance shall simply be calculated as part of that person's base capital, and he will be required to pay zakāh on those accretions whenever the zakāh on the base capital becomes due, whether it is a full year [ḥawl] after the accretions were received or a single day.

Mālik's position, which according to his commentators is reflected in these precepts, is that it is only the profits which one receives through utilization of one's base capital which will have the same due date as the base capital, regardless of whether those profits were received a full year before the due date or only a single day. Like the Kūfans, Mālik holds similarly that the natural increase

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[1]See Ibn Rushd, 1:159-161; cf. al-Bājī, 2:112; az-Zurqānī, 2:327.

[2]See Ibn Rushd, 1:160 (9).

of herds of livestock--sheep, cattle, camels, and the like--is calculated to be part of the entire herd at the time when zakāh is due on the herd, whether those animals were born a full year prior to the due date or only a single day before. Accretions, however, which do not accrue from one's base capital are only added to one's base capital if the base capital is below the level of niṣāb. In such cases, the accretions, if sufficiently large, will bring the base capital up to the level of niṣāb, and zakāh will become due on that new base capital one full year [ḥawl] later, if, at that time, the base capital is still at the level of niṣāb or above it. But, according to Mālik, once one's base capital has reached the level of niṣāb, further accretions are kept separate from it for purposes of paying zakāh. Each additional accretion which does not accrue from the base capital will have its own due date which, as reflected in the S-XN and SN precepts above, falls due one full year [ḥawl] after one receives that accretion or, as in the S-XN precept, after one receives the money that comes from selling the property or receiving payment on a debt the right to which one has received as inheritance.[1] In all cases, however, even when accretions are added to the base capital in order to bring it to niṣāb, payment of zakāh on accretions will not fall due until at least one full year after the accretion has been received.

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[1]See Ibn Rushd, 1:159-162; al-Bājī, 2:112; az-Zurqānī, 2:327.

Furthermore, the reasoning behind the Madīnan position, according to Mālik's commentators, is that zakāh is only due on property which is at the level of niṣāb after one has had the opportunity for a full year to increase the size of that capital by investment and other utilization of it. They refer to this as the "right of growth" [ḥaqq at-tanmiyah].[1] Thus, if accretions which do not accrue from one's base capital were added to the base capital when zakāh became due on the base capital, one would not have had the right for a full year to augment those accretions by investment and other means. This notion of the right to augment one's wealth before having to pay zakāh on it appears from the Muwaṭṭa' to be a very fundamental part of the Madīnan conception of zakāh. Mālik states, for example, that it is the A-XN that one who loans money to others is not required to pay zakāh on the money that is loaned out until it is repaid, unless it is repaid before a full year transpires. But even if the money is loaned out for several years, the one who loaned it out will be required to pay zakāh upon it only once at the time it is repaid. Mālik reports in the Muwaṭṭa' prior to this precept that ᶜUmar ibn ᶜAbd-al-ᶜAzīz required governors of his to return properties which they had expropriated wrongfully to their rightful owners, but he required that zakāh for only one year be levied on those properites because they had been uncollectible [ḍimār] dur-

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[1]Ibn Rushd, (Istiqāmah), 1:263; al-Bājī, 2:112; az-Zurqānī, 2:327.

ing the years they had been in the governors' possession.[1] Al-Bājī and az-Zurqānī explain both of these matters in terms of the precept that the owners of the property did not have the ability to augment their wealth during the period that it was loaned out or wrongfully expropriated.[2]

According to Ibn Rushd, there are two legal texts of generally accepted authenticity which apply to the S-XN and SN precepts in question; neither of these texts, however, upholds Mālik's precepts explicitly. The first is a ḥadīth according to which the Prophet is reported to have said that no zakāh is required on wealth [fī māl] until a full year [ḥawl] has transpired upon it. The second text is an 'athar according to which the caliph ᶜUmar ibn al-Khaṭṭāb, when collecting zakāh on livestock, included the newly born livestock as part of the total herd upon which the zakāh was levied. According to Ibn Rushd, there were no differences of opinion among the fuqahā' regarding the authenticity of these texts.[3] Both the Kūfans and Madīnans, as I indicated above, are agreed on the validity of ᶜUmar's practice regarding how zakāh is to be calculated on herds of livestock.

The Madīnans and Kūfans disagree, however, in that the Kūfans define all types of wealth upon which zakāh is due after the expiration of a full year to be analogous to

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[1]Muwaṭṭa', 1:253. [2]Al-Bājī, 2:113-114; az-Zurqānī, 2:328-330.

[3]Ibn Rushd, 1:159-160 (28), 161 (26); idem, (Istiqāmah), 1:263.

the procedure which ᶜUmar ibn al-Khaṭṭāb is reported to have followed in collecting zakāh on herds of livestock. Thus, they group the entirety of one's wealth into a single unit upon the due date of one's base capital, regardless of whether or not that wealth had been augmented by profits or accretions. From the Mālikī point of view, on the other hand, ᶜUmar's procedure is only analogous to the grouping of the profits which accrue from one's base capital into a single unit, but it is contrary to analogy with the procedure which is to be followed regarding the levying of zakāh upon accretions that do not result from one's base capital.[1] Thus, it would appear in this example that Mālik is again using his sunnah terms to indicate that he regards an analogy which others have drawn--in this case the Kūfans--to be mistaken.

Since the Prophet instituted zakāh and, according to the evidence cited by Ibn Rushd, is reported to have stipulated that zakāh not be paid on certain types of wealth until one had had them in his possession for a full year, Mālik probably would have regarded this ᶜamal to have gone back to the Prophet, whose collectors of zakāh would have had to collect zakāh on profits as well as accretions. But since, according to the sources I have consulted, there is no textual evidence supporting Mālik's precept, it would be another example of a very fundamental type of Madīnan ᶜamal regard-

[1]See Ibn Rushd, 1:159-162.

ing which nothing explicit had been transmitted, either for or against it. Furthermore, although there were legal texts that pertained to this ᶜamal precept, the precept itself provides essential information not contained in those texts. The ḥadīth in question states that zakāh is not required upon wealth until after the transpiration of a full year upon that wealth. Nevertheless, that ḥadīth can be used to support either the Madīnan or Kūfan position depending on how one defines wealth, i.e. as including both profits and accretions or as including profits but not accretions.

6. MḌS: Regarding a Plaintiff with One Supporting Witness

Mālik begins the chapter by citing a ḥadīth which states that the Prophet gave a verdict on the basis of the oath of the plaintiff supported by the testimony of a single witness. He then cites an 'athar which reports that ᶜUmar ibn ᶜAbd-al-ᶜAzīz wrote to his governor in Kūfah directing him to hand down verdicts on the basis of the oath of the plaintiff supported by the testimony of a single witness. Mālik cites an 'athar which reports that 'Abū Salamah--a highly regarded Madīnan judge during the first/seventh century[1]--and Sulaimān ibn Yasār[2] were asked about the validity of giving verdicts on this basis and replied that it was valid.

Mālik states that the sunnah has been long put into practice [MḌS] regarding the matter of handing down verdicts on the basis of the oath of the plaintiff supported by the testimony of a single witness. He adds that, if the plaintiff refuses to take an oath, the defendant will

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[1]'ABŪ SALAMAH ibn ᶜAbd-ar-Raḥmān ibn ᶜAwf (d. 94/712) was the son of one of the most famous Companions, ᶜAbd-ar-Raḥmān ibn ᶜAwf and was himself a very highly regarded Madīnan Successor, who presided over the Madīnan judiciary from 49/669 to 53/672 or 54/673. He was compared to Ibn ᶜUmar for his extensive knowledge; Wakīᶜ also reports that he ruled on the basis of the above precept. Wakīᶜ, 1:116-118.

[2]For data, see above pp. 67-68 , n. 3; he was one of the Seven Fuqahā'.

then be asked to take an oath absolving himself. If the defendant takes such an oath, the plaintiff will forfeit his claim. But if the defendant also refuses to take an oath absolving himself, the plaintiff's claim shall stand. Mālik adds that this procedure is only to be followed in money matters [al-'amwāl] and is never valid in legal matters pertaining to the administration of punishments [al-ḥudūd], the verification of marriage, divorce, or emancipation, or the proof of slander or theft. Mālik supports these contentions by a relatively lengthy legal argument.[1]

This precept was a major point of contention between Madīnans and non-Madīnans, and, according to ash-Shāfi^{c}ī, there was significant disagreement about its validity among the prominent Madīnan fuqahā' Ibn Shihāb az-Zuhrī and ^{c}Urwah ibn az-Zubair.[2] Other reports, however, claim that there was agreement among the Seven Fuqahā' on this matter--of whom ^{c}Urwah ibn az-Zubair was one of the prominent members.[3] Saḥnūn cites a text from Ibn Wahb in the Mudawwanah, according to which az-Zuhrī is reported to have said that it was MḌS from the days of the Prophet and the first caliphs that this procedure is never to be followed in verifying marriage and divorce. Saḥnūn adds another text which states that Sa^{c}īd ibn al-Musayyab and Rabī^{c}ah also held that view.[4] Ash-Shāfi^{c}ī indicates that Rabī^{c}ah clearly supported the validity of this precept.[5]

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[1]Muwaṭṭa', 2:721-725.

[2]Ash-Shāfi^{c}ī, "Ikhtilāf Mālik," pp. 196-197.

[3]See Ibn Rushd, 2:282 (4), and ar-Rasīnī, p. 195.

[4]Mudawwanah, 4:84 (10). [5]Ash-Shāfi^{c}ī, "Ikhtilāf Mālik, p. 197.

As for the fuqahā' outside Madīnah, Ibn Rushd states that neither al-'Awzā^cī in Syria or al-Laith ibn Sa^cd in Egypt or the majority of the people of Iraq held that this precept was valid.[1] Al-Laith disagrees with it in his letter to Mālik, referred to above.[2] He contends that this precept was never part of the ^camal of the regions outside Madīnah; the Companions never instituted it in those regions, nor did the first four caliphs ever enjoin the peoples of those regions to institute it. Although Mālik cites an 'athar prior to this precept stating that the 'Umayyad caliph ^cUmar ibn ^cAbd-al-^cAzīz wrote to his governor in Kūfah directing him to institute this precept there, al-Laith reports to the contrary that ^cUmar ibn ^cAbd-al-^cAzīz later retracted that position.[3] It might also be pointed out that even though al-Laith, unlike ash-Shāfi^cī mentions no explicit differences of opinion among the Madīnan fuqahā', there is, nevertheless, some indication in his letter that there had not been complete agreement on this matter in Madīnah, since al-Laith describes himself as among the most rigorous of people in adhering to that upon which the people of Madīnah had reached agreement.[4]

Mālik surely considered this precept, however, as being what later theorists called ^camal naqlī; in this case the ^camal is in keeping with the ḥadīth with which Mālik be-

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[1]Ibn Rushd, 2:282 (4). [2]See above, pp. 321-331.

[3]See Ibn Qayyim, (Sa^cādah), 3:97.

[4]See above, pp. 311-314, 321-331.

gins the chapter. Here again, however, the ᶜamal itself adds details of the most fundamental importance to this precept, which are not indicated at all by the legal texts which Mālik cites.[1]

Like the other sunnah precepts discussed so far, this precept is contrary to analogy with other closely related precepts in Islamic law. Generally, for example, the plaintiff is required to substantiate claims by the supporting testimony of at least two male witnesses of good character or the testimony of one male and two women of good character. This contrary procedure is supported by the Qur'ān.[2] Mālik, however, as indicated in the text of the Muwaṭṭa', regards this precept to be a special exception, applicable only in the case of money matters. There is a second procedure, however, which is also followed in money matters exclusively and upon which there was general consensus among the fuqahā' in and outside Madīnah, as Mālik states in the Muwaṭṭa' at the close of his argument defending the validity of this precept.[3] This second procedure pertains to cases in which the plaintiff has no witness. According to this procedure, however, the defendant is asked to take the first oath--which is the opposite of the procedure set forth in this precept--and if he takes an oath absolving himself, the plaintiff's claim will not stand. If, however, the defendant refuses to

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[1]For earlier discussion of this, see above, pp.141-143.

[2]Ibn Rushd, 2:282 (4); Qur'ān, 2:282.

[3]Muwaṭṭa', 2:724-725.

absolve himself by taking an oath, the plaintiff may then lay claim to his right by taking an oath on the validity of his claim.

Mālik's sunnah precept is also contrary to analogy with this second procedure which is to be followed in money matters when the plaintiff has no witness. For in that case, the defendant is given the chance to absolve himself at the outset by taking an oath contrary to the plaintiff's claim. According to Mālik's sunnah precept, however, the plaintiff's claim is sufficiently strong when supported by a single witness, that his oath is taken first and the defendant is not permitted to absolve himself at the outset by taking a contrary oath.

According to Ibn Rushd, those who oppose Mālik's sunnah precept do so on the basis that it is contrary to the procedure set forth in the Qur'ān and is supported only by isolated ḥadīth.[1] Ash-Shāfi^{c}ī also indicates that that is the reasoning of those who oppose this precept.[2] Mālik indicates that he is aware of the reasoning of his opponents, for he points out that the second procedure discussed above is, like the procedure to which he subscribes in his sunnah precept, contrary to the Qur'ānic text. He states, therefore, that if they can accept this other procedure for which there is no Qur'ānic authority, they should regard the well-

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[1]Ibn Rushd, 2:282 (4).

[2]Ash-Shāfi^{c}ī, "Ikhtilāf Mālik," p. 196.

established sunnah [MḌS] to be sufficient to establish the validity of this other precept, despite the fact that it is contrary to the Qur'ān.[1] Ash-Shāfi^{c}ī subscribes to this sunnah precept because of the isolated ḥadīth which Mālik transmits supporting it. But with Mālik, on the other hand, this isolated ḥadīth which he transmits would appear to be only an ancillary to ^{c}amal, indicating, for example, that the ^{c}amal is in conformity with something the Prophet did and must go back to him. The vital details of the precept, however, come not from Mālik's legal texts but from the non-textual source of Madīnan ^{c}amal. This would seem to be an example of how an isolated ḥadīth, which according to Mālik's legal reasoning would otherwise not be authoritative, takes on authority by virtue of its being in conformity with Madīnan ^{c}amal.[2]

Conclusions

In my analysis of Mālik's sunnah terms I have concentrated upon those of them which indicate Madīnan consensus, i.e., those which fall in the category of S-XN. The sunnah terms which I have investigated here seem to pertain to what later legal theorists called al-^{c}amal an-naqlī, ^{c}amal which transmitted, as it were, precepts of law from the Prophet which he had either instituted directly, tolerated, confirmed,

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[1]Muwaṭṭa', 2:724-725. [2]See above, pp. 179-184; cf., 484-487.

or simply left to be.[1] This seems to hold true for the remainder of Mālik's sunnah terms, although I have not analyzed them in detail. In some instances Mālik indicates the connection of his sunnah precepts with the Prophet by citing ḥadīth; sometimes he also cites āthār as if to indicate by that the continuity of the ᶜamal in question. But often in these examples there are no supporting texts at all for Mālik's sunnah precepts. Without more explicit evidence such precepts can only be deemed to be ᶜamal naqlī on the basis of presumption, such as, for example, that they pertain to fundamental aspects of law--like the precepts of zakāh--which the Prophet is known to have instituted and, hence, are of such nature as to be likely to go back to him. The question of whether or not such precepts are actually ᶜamal naqlī cannot be proven conclusively in the absence of explicit, authentic texts; rather it is a question of probability.

The scarcity of legal texts either for or against the sunnah precepts in these examples is very significant, beyond the consideration of being able to establish that something is ᶜamal naqlī. For, although there are no texts for some of the precepts, even those precepts which are supported by texts provide, nevertheless, essential information which is not to be found in the texts themselves. In fact, those texts when available seem to have essentially the func-

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[1]See above, pp. 410-415.

tion of indicating the source or continuity of the ᶜamal in question; they are ancillaries to ᶜamal, so to speak. The transmission of the content of the precept, however, comes from ᶜamal. Thus, from the Mālikī point of view, it is indeed an ᶜamal naqlī, an ᶜamal which is like transmission [an-naql].

The paucity of texts to support these precepts made possible the criticisms of those like 'Abū Yūsuf and ash-Shaibānī who held that the source and continuity of Madīnan ᶜamal were questionable and not verifiable and who refused to subscribe to any precept of Madīnah unless there was textual support for it. This insistence upon texts is a notable characteristic of the writings of 'Abū Yūsuf, ash-Shaibānī, and ash-Shāfiᶜī--not to mention later writers like Ibn Ḥazm.[1] It distinguishes their writings, as I have mentioned, from the letter of al-Laith ibn Saᶜd, who does not question the priority of Madīnah over other cities in matters of knowledge and continues to adhere to Madīnan local consensus.[2] But this paucity of texts to support Madīnan ᶜamal made it difficult for Madīnans to uphold the validity of their ᶜamal precepts among those for whom insistence upon legal texts as the only source of law had become the ground rules of debate. For the validity of the Madīnan precepts rested upon the authority of the non-textual source of Ma-

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[1]See above, pp.321-356.

[2]See above, pp. 321-331.

dīnan ᶜamal, the validity of which rested in turn upon the reputation of Madīnah and its people of learning and not upon the fact that there were comprehensive legal texts to support it.

This scarcity of texts to support fundamental precepts of Madīnan ᶜamal may have resulted from the fact that Madīnan ᶜamal lacked continuity with the past and had come from a variety of unidentified sources over the years, which are essentially the contentions of 'Abū Yūsuf and ash-Shaibānī. Investigation into these contentions would require a sound social, economic, political, and cultural history of Madīnah, as I have mentioned.[1] Nevertheless, assuming--as the Madīnans and later Mālikīs did--that fundamental precepts of Madīnan ᶜamal like the sunnah precepts analyzed in this chapter actually went back to the Prophet, the hypothesis arises that muḥaddith's in the early period--especially those in Madīnah--may have relied upon Madīnan ᶜamal as a criterion for determining what matters needed to be transmitted as ḥadīth and which did not. Thus, they may have felt it redundant to transmit ḥadīth about very fundamental precepts of law that were a well-established part of ᶜamal. One would expect that such reliance upon ᶜamal would have been most likely during the first generations, at a time when the validity of Madīnan ᶜamal had not been called into question.

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[1]See above, pp. 1-2.

Furthermore, in keeping with this hypothesis, it may also have been the case that Madīnan ᶜamal in the early period provided the semantic context for those ḥadīth and āthār which the early muḥaddith's did transmit. I mentioned earlier, for example, how ḥadīth about rituals like wuḍū' [ablutions] and ṣalāh [daily prayers] seem to assume a semantic context in which the receptor of the ḥadīth is already familiar with the ᶜamal of wuḍū' and ṣalāh. Similarly, ḥadīth such as the report that the Prophet handed down verdicts on the basis of the oath of the plaintiff supported by the testimony of a single witness are far more ambiguous when divorced from a semantic context in which the ᶜamal of the precept is part of the experience of the receptor than when it is not.[1] Living within the semantic context of Madīnan ᶜamal, transmitters of ḥadīth and āthār may not have realized the ambiguities that their ḥadīth and āthār would entail for those who were not acquainted with the same semantic context; thus, they may have seen no need to explain what they transmitted in greater detail. The texts they transmitted, therefore, would be far more ambiguous and prone to diverse interpretations outside the context of ᶜamal than they would have been within it.

The scarcity of explicit legal texts regarding precepts of Madīnan ᶜamal is also significant in light of

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[1]See above, pp. 298-299; cf., 436-448.

the fact that the precepts discussed in this chapter constituted important points of difference among the fuqahā'--often between Kūfans and Madīnans, sometimes between Madīnans and others, and in the case of the MḌS precept between some of the Madīnans themselves. Thus, although the fabrication of ḥadīth took place during the early period, it must not have been either as systematic or effective as some have held.[1] For had it been that systematic and effective, one would expect to find explicit ḥadīth and āthār supporting these Madīnan precepts as well as the non-Madīnan precepts which were contrary to them. Indeed, those isolated ḥadīth mentioned by Ibn Rushd, al-Bājī, or az-Zurqānī supporting some of these Madīnan precepts may have been fabricated. It is significant, however, that even though they support the Madīnan positions, Ibn Rushd, al-Bājī, and az-Zurqānī do not regard them as being of established authenticity.

It should be noted that each of these sunnah precepts is contrary to analogy with related precepts of law. They are often points of difference, in fact, because those who differ with the Madīnans--especially the Kūfans--have applied the analogies of those related matters of law to these precepts. For example, the Kūfans and others treat liᶜān as analogous to divorce, and they treat wealth obtained through accretions [fawā'id] as being analogous for purposes of za-

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[1]See above, pp. 292-302.

kāh with wealth accrued from profits on one's base capital.[1] Thus, Mālik's sunnah terms indicate that there is something distinctive about the precepts in connection with which these terms are used which makes them different from related matters of law. The fact that these precepts are ᶜamal naqlī in addition to Mālik's use of the word sunnah would indicate, furthermore, that Mālik regarded the distinctiveness of these sunnah precepts as being upheld by the authority of the Prophet.

Finally, in the examples analyzed in this chapter, Mālik has used his terminology in connection with precepts upon which there had been significant differences of opinion among the fuqahā'. This lends further support to the hypothesis that the primary criterion by which Mālik determined when to use his terminology in the Muwaṭṭa' and when not to, was that of whether or not the precept in question was a point of difference among the fuqahā'.[2] Furthermore, the differences of opinion within Madīnah regarding Mālik's MḌS precept analyzed in this chapter raises the question of to what extent Mālik's sunnah terms which, like MḌS, do not give any explicit indication of local consensus may be similar to the AN and other terms in the Muwaṭṭa' which Mālik uses for precepts regarding which there had been differences of opinion in Madīnah.

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[1]See above, pp. 560-564, 557-560. (These analogies seem to be based on textual sources of law.)

[2]See above, pp. 530-538.

CHAPTER VIII

TERMS REFERRING TO THE PEOPLE OF KNOWLEDGE IN MADĪNAH

General Observations

I have classified forty-three expressions in appendix 2 as falling in the category of references to the people of knowledge of Madīnah. Most of them speak of the people of knowledge of Madīnah in general terms, giving the impression that Mālik is using these expressions as indications of Madīnan ijtimāᶜ. He will say, for example, that the people of his city have always held to the validity of a certain precept ["wa hādhā 'l-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm bi-baladinā;" -zĀIb], or he will say that the people of knowledge whom he encountered during his lifetime held to its validity ["wa hādhā 'l-ladhī 'adraktu ᶜalaihi 'ahl al-ᶜilm bi-baladinā;" x̄dIb]. Some other expressions are more general than these. Mālik will say, for example, "This is what I have heard transmitted from the people of knowledge" ["wa hādhā 'l-ladhī samiᶜtu min 'ahl al-ᶜilm;" stx]I] or simply, "This is what I have heard transmitted" ["wa hādhā 'l-ladhī samiᶜtu;" stx].

There are a few expressions which explicitly refer

to the totality of persons whom Mālik regarded to be "people of knowledge". He states once that all whom he has encountered hold to the validity of a certain precept, at another time that he has heard the contrary from none of the people of knowledge, another time that none of the people of learning doubts the precept in question, and in another example he asks the rhetorical question of whether anyone could doubt the validity of the precept he is discussing.[1]

A few expressions Mālik uses in referring to the people of knowledge appear, however, to designate limited groupings of the Madīnan fuqahā'. The most common expression which I would classify in this category is "man 'arḍā min 'ahl al-ᶜilm" [those of the people of knowledge whom I accept; lit., who are pleasing to me; rḍ]I]. Similarly, Mālik uses the expression once "al-jamāᶜah bi-baladinā" [the group in our city; Jb].[2] Such expressions appear not to be indications of Madīnan ijtimāᶜ but rather of Mālik's preference for the opinions of some of the Madīnan fuqahā' over those of others of them. Indeed, this is the explanation of such usages which Mālik is reported to have given in the text mentioned above.[3] Such a conclusion is, nevertheless, somewhat problematic with regard to expressions like "man 'arḍā min 'ahl al-ᶜilm" because it is possible that such an expression re-

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[1]See Muwaṭṭa', 2:541, 788, 521; 1:386.

[2]Ibid., 2:615. [3]See above, pp. 538-545.

fers simply to the totality of the Madīnan fuqahā' whom Mālik regarded as acceptable and, hence, as legitimate constituents of 'ijmā^c. As mentioned earlier, there were many persons of learning in Madīnah whom Mālik did not regard as worthy of transmitting learning and whom he described as people from whom no benefit could be derived.[1] Thus, it may be people such as they whom Mālik is excluding by expressions like "man 'arḍā min 'ahl al-^cilm".

Almost two-thirds of the references to the people of knowledge which I have indexed occur in combinations with other terms. The two expressions which occur most frequently in conjunction with other terms are x̄dIb ["wa hādhā 'l-ladhī 'adraktu ^calaihi 'ahl al-^cilm bi-baladinā"] and stx]I ["wa hādhā 'l-ladhī sami^ctu min 'ahl al-^cilm"]. Furthermore, there does not seem to be any pattern in the terms with which they occur. Rather, they occur in connection with a wide variety of terms: S-XN, MḍS, SN, AMN, AMN-X, A-XN, AN, and so forth.

Examples

1. -zĀIb: Regarding the Talbiyah[2] of Pilgrimage

Mālik begins the chapter with a ḥadīth which indicates that the Prophet permitted his Companions while making the pilgrimage with him to say either the talbiyah or the takbīr [the words, "Allāhu 'akbar"]. Mā-

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[1]See above, pp. 72-76.

[2]Talbiyah: The term given the words which a pilgrim

lik then cites an 'athar which reports that ᶜAlī ibn 'Abī Ṭālib used to cease saying the talbiyah at sunset on the Day of ᶜArafah [the ninth day of pilgrimage]. After this 'athar, Mālik cites the term -zĀIb [this is the 'amr which the people of knowledge in our city have always held to]. Mālik then cites āthār which report that ᶜĀ'ishah and ᶜAbd-Allāh ibn ᶜUmar would break off the talbiyah at sunset on the Day of ᶜArafah.[1]

The expression Mālik uses in this example, -zĀIb, indicates that he regarded the ᶜamal in question to have unbroken continuity with the past back to the days of the Companions mentioned in the āthār. The expression appears to indicate, furthermore, that there was local consensus among the Madīnan fuqahā' on the validity of that ᶜamal.

According to al-Bājī and az-Zurqānī the ᶜamal in question is a point of difference between the Madīnans and the Kūfans 'Abū Ḥanīfah and Sufyān ath-Thawrī. Later fuqahā' like ash-Shāfiᶜī and 'Aḥmad ibn Ḥanbal also disagreed with the Madīnans over it and took the Kūfan position. The Kūfan position in this matter is supported by a ḥadīth, which is regarded to be authentic and is transmitted in the collections of al-Bukhārī and Muslim. This ḥadīth reports that when the Prophet performed his final pilgrimage he continued to say the talbiyah after the Day of ᶜArafah and into the tenth day of the pilgrimage until he performed the symbolic rite of pilgrimage of casting stones at Satan.[2]

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recites: "Labbaik, Allāhumma,labbaik! Labbaika, lā sharīka laka, labbaik! 'Inna 'l-ḥamda wa 'n-niᶜmata laka wa 'l-mulk; lā sharīka lak" [Here I am, O God, here I am (responding to Your call). Here I am: You have no partner; here I am. All praise and bounty are Yours and all dominion. You have no partner].

[1]Muwaṭṭa', 1:337-338. [2]Al-Bājī, 2:216; az-Zurqānī, 3:56-57.

The texts pertaining to this precept which are cited in the Muwaṭṭa' as well as the ḥadīth reported in al-Bukhārī and Muslim which is said to be the basis of the opinions of 'Abū Ḥanīfah, Sufyān ath-Thawrī, and others* are all reports of actions. As discussed earlier, reports of actions are regarded to be insufficient evidence in themselves, according to Mālikī legal theory, to establish that the act reported is obligatory for others. On the other hand, reports of contrary actions by prominent, knowledgeable Companions and fuqahā'--such as ᶜAlī ibn 'Abī Ṭālib, ᶜĀ'ishah, and Ibn ᶜUmar in this example--are regarded by the same theory to be sufficient evidence that the reported action which they are contrary to is, indeed, not obligatory.[1]

Furthermore, according to Mālikī legal theory as well as Ḥanafī and Ḥanbalī, the āthār of prominent Companions are used as indications of the Prophetic sunnah, on the presumption that those Companions knew the Prophetic sunnah well and adhered to it closely.[2] This seems to be how Mālik is using the āthār he cites in this example, although he does not use the term "sunnah". As the ḥadīth indicates at the beginning of the chapter, the talbiyah and takbīr were used by the Companions of the Prophet in his presence while they were performing pilgrimage. The presumption underlying Mālik's reference to the āthār he cites would probably be that,

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[1]See above, pp. 188-195. [2]See above, pp. 161-170.

had the Prophet regarded it as obligatory or as desired normative behavior for his Companions that they continue to say the talbiyah after the Day of ᶜArafah, he would have made that clear, especially to those of them like his nephew ᶜAlī and his wife ᶜĀ'ishah, who were very close to him and who also would probably have been aware of the Prophet's not having ceased to say the talbiyah himself.

Mālik probably would have regarded the type of ᶜamal represented by this precept to be of the category of what later legal theorists referred to as ᶜamal naqlī. The ᶜamal naqlī, although contrary to the Prophet's own action in this case, would have the authority of his approval ['iqrār].[1] Since the ᶜamal in this case indicates a norm which is contrary to an isolated act the Prophet is reported to have done, this may also be taken as an instance of how ᶜamal, according to ash-Shāṭibī, is used to distinguish non-normative actions from those that were intended to be normative.[2]

Mālik cites several reports in this chapter to support the precept in question. Unlike the manner of presentation in the sunnah precepts discussed in the preceding chapter, Mālik does not cite his precept separately from the reports he gives. Rather the precept is contained in those reports; the term is cited immediately after the first 'athar in order to indicate that the continuous ᶜamal of

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[1]See above, pp. 410-415. [2]See above, pp. 436-480.

the Madīnan people of knowledge is in conformity with the action reported in that 'athar. Furthermore, unlike his manner in the sunnah precepts discussed earlier, Mālik does not add additional information to the precept as reflected in the 'athar, beyond the consideration that he indicates that the action reported in that 'athar is regarded as the norm by the Madīnan people of knowledge.

2. -zĀIb: Regarding the Performance of Ṭawāf[1]

> Mālik begins the chapter with a ḥadīth which reports that the Prophet made the first three circuits around the Ka^c^bah, while performing ṭawāf, at a rapid pace [raml], coming to the black corner stone of the Ka^c^bah at the end of the third circuit. Mālik then cites the term: -zĀIb. In the remainder of the chapter Mālik cites āthār which report that ^c^Abd-Allāh ibn ^c^Umar, ^c^Urwah ibn az-Zubair, and ^c^Abd-Allāh ibn az-Zubair performed the ṭawāf in the same manner. He concludes, however, by citing an 'athar which reports that Ibn ^c^Umar would omit part of the rites of ṭawāf when performing the rite from Makkah and that, in such cases, he would also omit the raml during the first three circuits.[2]

This example is also of the category of ^c^amal naqlī. Mālik cites evidence to indicate that it conforms to an act of the Prophet and prominent Madīnans after him. According to Mālik's commentators, the precept in question originated in a command of the Prophet. Several ḥadīth report that

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[1]Ṭawāf: The act of walking around the Ka^c^bah [the Temple of Abraham in Makkah] seven times in a row in a counterclockwise direction with the Ka^c^bah to one's left. It is regarded to be an act of worship analogous to the performance of prayer [ṣalāh]; hence, it is performed only in the state of ritual purification [ṭahārah].

[2]Muwaṭṭa', 1:364-365.

once when the Prophet came to Makkah with his Companions the idolatrous Makkans are said to have taunted them that they had been so emaciated by the fevers of Madīnah that they would not even be able to perform the ṭawāf around the Ka^c^bah. Thus, when it came time for the Prophet and his Companions to perform the ṭawāf, he commanded them to walk at a rapid pace during the first three circuits in order to show the Makkans that they were still strong and vigorous. According to other ḥadīth the Prophet continued to perform the ṭawāf in that manner even after the conquest of Makkah and after the inhabitants of Makkah had embraced Islam.[1]

The term -zĀIb indicates that the ^c^amal of the Madīnan people of knowledge had remained in direct continuity with the Prophet's action, as reported in the ḥadīth, and the actions of the other prominent Madīnans reported in the remainder of the chapter. The term almost certainly stands for Madīnan local consensus on the precept in question, for it was a matter regarding which, according to Mālik's commentators, there had been extensive agreement among the fuqahā'. Nevertheless, the Companion Ibn ^c^Abbās is reported to have disagreed. He held instead that walking at a rapid pace during the first three circuits of the ṭawāf was not the sunnah of the Prophet; rather, Ibn ^c^Abbās is reported to have held, the Prophet commanded his Companions to per-

[1]Al-Bājī, 2:284; az-Zurqānī, 3:124-126.

form ṭawāf in that manner only to indicate to the idolatrous Makkans that the Muslims in Madīnah were still healthy and strong. It is reported that ᶜUmar ibn al-Khaṭṭāb entertained the same idea as Ibn ᶜAbbās and considered omitting the raml from the first three circuits of ṭawāf. Al-Bājī and az-Zurqānī report, however, that ᶜUmar then gave up that idea because the Prophet had continued to perform ṭawāf according to that manner.[1]

Like the preceding example but in contrast to his manner of presentation in some of the sunnah precepts, Mālik cites his term -zĀIb in connection with a precept regarding which there were ample texts. Furthermore, Mālik does not formulate the precept separately but rather cites the term immediately after the first report and in such a manner as to indicate that the action reported in that text is in conformity with the continuous ᶜamal of the Madīnan people of knowledge. Again, in contrast to the sunnah precepts, Mālik does not provide additional information to the texts from the non-textual source of Madīnan ᶜamal other than the fact that he indicates that the actions reported in the texts he has cited are normative.

The 'athar cited at the close of the chapter, which reports that Ibn ᶜUmar performed the rites of pilgrimage and ṭawāf differently when initiating them from within Makkah,

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[1]See az-Zurqānī, 3:124-126; al-Bājī, 2:284.

reflect the precept of Islamic law that such rites are performed differently by those in Makkah and those who come to Makkah from abroad to perform them.[1] Other distinctions in the rites of pilgrimage between those who are in Makkah and those coming from the outside are mentioned in the Qur'ān.[2]

3. -zĀIb: Regarding Steeping Dates and Raisins

> Mālik cites two ḥadīth at the beginning of the chapter which report that the Prophet forbad [nahā] that busr [dates on the verge of becoming ripe] be steeped in the same container with ruṭab [newly ripened dates] or that tamr [dried dates] be steeped in the same container with raisins. After the second ḥadīth Mālik cites the term -zĀIb, and Mālik adds that steeping these fruits together is regarded as abhorrent [yukrahu] because of the Prophet's order against it [nahī].[3]

Like the preceding examples, this precept would be classified as ᶜamal naqlī, originating in this case with the commands of the Prophet reported in the ḥadīth. Here again the term -zĀIb is used in conjunction with texts and does not provide additional information to what is contained in the texts, although Mālik's interpretation of the practice mentioned in the ḥadīth as being abhorrent [yukrahu] is noteworthy, and I will comment on it further shortly. The texts in this example are reports of statements and not actions, as in the preceding examples.

The point in question is a matter of difference between the Madīnans and 'Abū Ḥanīfah, who held that there was

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[1]Al-Bājī, 2:286; az-Zurqānī, 3:126. [2]Qur'ān, 2:196.
[3]Muwaṭṭa', 2:844.

no harm in the practice mentioned in these ḥadīth. According to Ibn Rushd, the Ḥanafī position is based on the consideration that there are other ḥadīth which permit one to steep the fruits mentioned in the above ḥadīth separately. They reason, therefore, that it is not the steeping itself [al-intibādh] against which the command was issued but rather the production of intoxicating drink from such steeping. Hence, they conclude that it is permissible to steep such fruits together, provided one takes care that they not be left long enough to become intoxicating.[1]

According to Ibn Rushd and az-Zurqānī, the Madīnan view of why the Prophet gave the commands in these ḥadīth was because beverages made from steeping these fruits together turn into intoxicants imperceptibly and much more rapidly than normal.[2] It would appear, then, that, according to the Madīnan view, these ḥadīth are instances of the Prophet's applying the principle underlying sadd adh-dharā'i'.[3] For, although there is no harm in the act of steeping these fruits together itself, it is likely that that act will lead to the production of an intoxicating beverage which the one

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[1]Ibn Rushd, 1:281 (13). According to az-Zurqānī, 'Abū Ḥanīfah held that this order had been given when the Muslims were living under straitened conditions; under such circumstances, the practice of steeping these fruits together was viewed as being extravagant and wasteful; idem, 5:126-127. 'Abū Ḥanīfah's opinion may also be related to his rejection of isolated ḥadīth under certain stipulations; see appendix 1.

[2]Ibn Rushd, 1:281 (13); az-Zurqānī, 5:126-127.

[3]For discussion of this principle, see above, pp. 262-268.

who made it would not be permitted to use.

Az-Zurqānī holds that the Prophet's command against steeping such fruits together does not indicate strict prohibition of that practice but rather that the practice is abhorrent and should not be done. He believes that this is what Mālik means by his explanation that the practice is abhorrent [yukrahu].[1] If az-Zurqānī is correct, it would appear that Mālik has relied upon the continuous ᶜamal of the Madīnan people of knowledge to interpret the wording of a legal text in a manner which is contrary to the obvious [ẓāhir] meaning of the ḥadīth.[2] For the obvious meaning of the ḥadīth would be that the Prophet simply prohibited such practices altogether.

However that may be, it should be kept in mind that the meaning of the expression "abhorrent" [yukrahu, makrūh] was stronger in the early period and much closer to the meaning of prohibition [ḥurmah] than it was in the later period. According to ash-Shāṭibī, the early fuqahā' were careful not to describe a matter as prohibited [ḥarām] unless they had certain knowledge that it was. He quotes a statement attributed to Mālik:

> It was not the custom of the people ['amr an-nās] or the custom ['amr] of our predecessors who have gone before us and whose examples we follow and upon whom is

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[1]Az-Zurqānī, 5:126-127.

[2]According to Mālikī legal theory, ẓāhir statements are of conjectural meaning; for discussion of them, see above, pp. 146-147.

the utter reliance [miᶜwal] of Islam that one say: "This is ḥalāl [permissible], and that is ḥarām." Rather it was [their custom] to say: "I abhor ['akrahu] this, and I am of this opinion ['arā] about that." As for saying "ḥalāl" and "ḥarām", it is a fabrication against God [iftirā' ᶜalā 'Llāh]. . . . For the ḥalāl is that which God and His Messenger have declared to be ḥalāl, and the ḥarām is that which they have declared to be ḥarām.[1]

Similarly, Ibn al-Qāsim says about a certain question in the Mudawwanah, "In my opinion it is not clearly ḥarām [al-ḥarām al-bayyin] . . . but I abhor ['akrahu] that it be put into practice."[2] In Siyar al-'Awzāᶜī, 'Abū Yūsuf claims that this was also the attitude of 'Ibrāhīm an-Nakhaᶜī[3] and his companions. 'Ibrāhīm is reported to have said that when they would give fatwā's permitting some things or forbidding others, they would say, "This is abhorrent [makrūh], or there is no harm in that [lā ba's bihī]." But they regarded it reprehensible that one say that such matters were ḥalāl or ḥarām.[4]

In light of these quotations, it would appear that, although by "abhorrent" Mālik probably meant something stronger than what later fuqahā' meant by "makrūh", nevertheless, he must not have regarded the Prophet's command [nahī] in the ḥadīth he cites to have constituted strict prohibition

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 4:286-287.

[2]Mudawwanah, 3:122 (19). Compare his statement elsewhere: "I do not like it at all [lā yuᶜjibunī]. It is not permissible, rather it is ḥarām." Ibid., 2:379 (9).

[3]For data on 'Ibrāhīm, see above, p. 156, n. 1.

[4]'Abū Yūsuf, p. 73.

[ḥurmah]. Thus, although one could interpret the ḥadīth which Mālik cites as indicating that the practices the Prophet forbad were ḥarām--which would be the obvious [ẓāhir] interpretation--Mālik relies upon the source of Madīnan ᶜamal to give an interpretation to the textual sources to which he subscribes which is not obvious.

4. -zAIN:[1] Regarding the Waiting Period of a Pregnant Woman Whose Husband Dies

Mālik begins the chapter by citing an 'athar which reports that the Companions ᶜAbd-Allāh ibn ᶜAbbās and 'Abū Hurairah disagreed with each other regarding what the period of waiting [ᶜiddah] should be for a pregnant woman whose husband dies, before it will be permissible for her to remarry. Ibn ᶜAbbās was of the opinion that she must wait either until she delivers the child or until four months and ten days have passed, whichever period is longer. 'Abū Hurairah contended, on the other hand, that once she delivers the child she may remarry. 'Umm Salamah, a wife of the Prophet, informs them that a certain woman--Subaiᶜah al-'Aslamīyah--had delivered a child of her husband shortly after the husband's death. A young suitor and an older suitor offered to marry her after her husband had died. Subaiᶜah inclined toward the younger man, so 'Umm Salamah states that the older man claimed that Subaiᶜah could not yet marry because she had not completed the four months and ten days. 'Umm Salamah explains that some of Subaiᶜah's relatives were abroad at that time and the older suitor was attempting to delay the marriage until they returned, with the hope that he could use his influence upon them to get them to convince Subaiᶜah to marry him. Subaiᶜah brought the matter to the Prophet's attention, and he told her that it was permissible for her to marry immediately.

Mālik cites an 'athar which reports that ᶜAbd-Allāh ibn ᶜUmar and his father, ᶜUmar ibn al-Khaṭṭāb, held that the opinion of 'Umm Salamah above was correct. ᶜUmar ibn al-Khaṭṭāb used to say that a pregnant woman whose husband dies may remarry immediately after deliv-

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[1]This symbol stands for, "Wa hādhā 'l-'amr al-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm ᶜindanā" [this is the 'amr which the people of knowledge among us have always held to].

ering the child, even if the deceased husband still is lying in the bed in which he died and has not been buried. Mālik concludes the chapter by citing two shorter versions of the ḥadīth with which he began the chapter. After the last of these, he cites the term -zĀIN.[1]

As in the preceding examples, Mālik is using this -zĀIN term in connection with ample textual information. Again, Mālik adds nothing to the precept from ᶜamal which is not already contained in the texts, except the supporting statement that the precept in those texts is in conformity with the continuous ᶜamal of the Madīnan people of knowledge.

The type of ᶜamal for which the term is used is again of the category of ᶜamal naqlī. It is based on a precedent set by the Prophet and is supported by the statements of the prominent Companions ᶜUmar ibn al-Khaṭṭāb and his son ᶜAbd-Allāh. The precept is also analogous to a Qur'ānic verse which states that the period of waiting of pregnant women who are divorced during their pregnancy is until they deliver;[2] the precept of that verse is not identical, as Ibn Rushd points out, because it was revealed about divorce and not about dissolution of marriage by virtue of the husband's death.[3]

According to Ibn Rushd and Mālik's commentators, there was widespread agreement among the fuqahā' on the validity of this precept. Mālik himself reports, however, that

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[1]Muwaṭṭa', 2:589-590. [2]Qur'ān, 4:65.

[3]Ibn Rushd, (Istiqāmah), 2:95.

Ibn ᶜAbbās--at least initially--had held a contrary opinion. It is reported, however, that Ibn ᶜAbbās later changed his opinion and adopted the view of the majority. Ibn ᶜAbd-al-Barr, according to az-Zurqānī, had held that such reports about Ibn ᶜAbbās changing his opinion are probably correct, since his major students are not known to have held his other opinion. It is also reported, however, that ᶜAlī ibn 'Abī Ṭālib held the same opinion as Ibn ᶜAbbās. Ibn Rushd and Mālik's commentators account for these contrary opinions by stating that Ibn ᶜAbbās and ᶜAlī based them on an interpretation which combines the two pertinent verses of the Qur'ān. The first verse, mentioned above, states that the waiting period of a woman divorced during pregnancy is until she delivers. The second verse[1] pertains explicitly to women whose husbands die--although it specifies nothing about pregnant women--and it states that their period of waiting will be four months and ten days. Thus, Ibn ᶜAbbās and ᶜAlī concluded that the period of waiting of a pregnant woman whose husband dies would be whichever of these periods is longer in her case.[2]

The expression "ᶜindanā" [among us] in this example appears to have the same meaning as "bi-baladinā" [in our city], which is generally used in these references to the

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[1]Qur'ān, 2:234.

[2]See Ibn Rushd, (Istiqāmah), 2:95; al-Bājī, 4:132-133; az-Zurqānī, 4:142-146.

people of knowledge. For, as mentioned above, there was general consensus on the validity of this precept, in and outside Madīnah.

5. x̄dIb: Regarding One Who Joins the Friday Prayer Late

> Mālik reports that az-Zuhrī held that it was the sunnah that a person who comes late to Friday prayers [al-jumuᶜah] but is able to perform at least one rakᶜah [unit of the prayer] with the 'imām has made the Friday prayer and need only make up one rakᶜah after the 'imām has finished praying. Mālik cites the term x̄dIb and adds that the reason for this precept is that the Prophet said that whoever makes at least one rakᶜah of a prayer [with the 'imām] has partaken of that prayer.[1]

This precept could be of the category of ᶜamal naqlī. That is not clear, however, from the information that Mālik provides. Az-Zuhrī states his opinion and regards it to be sunnah. But Mālik's comment that the reason for it is because of the ḥadīth that whoever makes at least one rakᶜah of a prayer has partaken of that prayer, makes it appear that az-Zuhrī's opinion is ijtihād based on his interpretation of that ḥadīth. The term x̄dIb ["wa ᶜalā dhālika 'adraktu 'ahl al-ᶜilm bi-baladinā;" I encountered the people of knowledge in our city holding to this] does not, in the context of the textual evidence which Mālik cites, indicate that the ᶜamal in question goes back to an explicit part of the Prophet's sunnah, since Mālik cites no textual evidence of the precept earlier than az-Zuhrī of the generation

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[1]Muwaṭṭa', 1:105.

before his own. The term he cites does indicate, however, that the precept in question had become part of Madīnan local consensus. The precept, furthermore, is of the nature of ᶜumūm al-balwā,[1] since whenever Friday prayers are performed it is likely that there will be people who come late and will want to know what is required of them under such circumstances. Hence, it could be argued that this precept probably went back before az-Zuhrī even to the time of the Prophet and the institution of Friday prayers. In such a case Mālik's comment supporting az-Zuhrī's opinion would be seen as a type of supportive legal reasoning by which he defends the validity of Madīnan ᶜamal--similar to what he does elsewhere in the Muwaṭṭa'--and not necessarily the sole basis of either az-Zuhrī's opinion or of the Madīnan people of knowledge who agreed with him.

Mālik cites no textual evidence for the precept other than az-Zuhrī's statement. The term follows that statement, and Mālik adds nothing additional to the precept from ᶜamal. For his comment does not add anything to the precept, rather it only supports the validity of the precept.

This precept is a matter upon which there had been differences of opinion among the early fuqahā', although, according to Ibn Rushd and Mālik's commentators, the majority of them, including those outside Madīnah, had held to

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[1]For discussion of this concept, see above, pp. 184-188.

opinions identical or very close to the Madīnans. 'Abū Ḥanīfah and 'Abū Yūsuf, for example, would agree with Mālik and the Madīnan people of knowledge that whoever came late to Friday prayers and made the last rakᶜah with the 'imām had partaken of the prayer. They went further, however, and held that as long as the latecomer joins the prayer before it finishes he has partaken of it and need only pray two rakᶜah to make up what he missed. Mālik and the Madīnans, on the other hand, held that one who came later than the last rakᶜah of the Friday prayer had not partaken of it and must pray four rakᶜah afterward--the number prayed in ordinary noon [ẓuhr] prayers.[1] This point of difference, however, is not specifically discussed in the Muwaṭṭa'.

According to Mālik's commentators, those who disagreed with this precept were the Syrian Makḥūl, Mujāhid and ᶜAṭā' ibn 'Abī Rabāḥ of Makkah, and the Yamanī Ṭāwūs;[2] their opin-

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[1]See al-Bājī, 1:191; az-Zurqānī, 1:323; cf. Ibn Rushd, 1:111 (6).

[2]MAKḤŪL ibn 'Abī Muslim Shuhrab ad-Dimashqī (d. 112 or 119/730 or 737) was one of the important Successors and a prominent Syrian faqīh and muḥaddith. Al-'Awzāᶜī and Muḥammad ibn 'Isḥāq studied under him. Makḥūl is reported in the Fihrist of Ibn an-Nadīm to have compiled works on fiqh; numerous citations from Makḥūl are contained in the Muwaṭṭa' and Mudawwanah. Sezgin, 1:404.

MUJĀHID ibn Jabr al-Makkī (ca. 21-104/642-722) was born in Makkah and was one of the most highly regarded students of Ibn ᶜAbbās. He too was among the most important Successors. He is especially important because of his Qur'ānic commentary but was also a noted faqīh. Ibid., 1:29.

ᶜAṬĀ' IBN 'ABĪ RABĀḤ 'Aslam (27-114/647-732) was born in the Yaman and is said to have known a very large number of Companions. Az-Zuhrī, al-'Awzāᶜī, Ibn Juraij, 'Abū Ḥa-

ion is said to have been that anyone who missed the khuṭbah [sermon] of Friday prayers had not partaken of them, even if that person prayed the entirety of the prayer which follows the khuṭbah. They required such a person to make up for having missed the Friday prayers by praying four additional rakᶜah as is ordinarily done when praying the noon prayer. These fuqahā' based their opinion, according to az-Zurqānī, on the fact that Friday prayers are not regarded to be valid if the 'imām omits the khuṭbah. In that case the 'imām would be required to lead the people in four rakᶜah as for normal noon prayers instead of two, which is the case in Friday prayers. Az-Zurqānī states that there is 'ijmāᶜ on the validity of the precept that the 'imām may not omit the khuṭbah from Friday prayers; hence, these fuqahā' have concluded that the khuṭbah is such an essential part of the Friday prayers that one who comes too late to hear it cannot be said to have partaken of Friday prayers.[1]

6. ẋdIb: Regarding Husbands Who Cannot Support Their Wives

Mālik states that Saᶜīd ibn al-Musayyab held that a husband and wife should be separated if the husband is unable to support her. Mālik then cites the term ẋdIb.[2]

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nīfah, and others are said to have studied under ᶜAṭā'. He was an important muḥaddith, faqīh, and Qur'ānic commentator and was known as "the muftī of Makkah." Ibid., 1:31.

For data on Ṭāwūs, see above, p. 558, n. 2.

[1]Az-Zurqānī, 1:323; see also al-Bājī, 1:191; Ibn Rushd, 1:111 (6).

[2]Muwaṭṭa', 2:589.

This precept constituted a point of difference between the Madīnans and the Kūfans 'Abū Ḥanīfah and Sufyān ath-Thawrī, who held that the husband's failure or inability to support his wife were not sufficient grounds for separating them. This Kūfan position, according to Ibn Rushd, was based upon the consideration that the inviolability of marriage was supported by '*ijmā*ᶜ. Hence, they held that only those acts could bring about the dissolution of marriage for which there was evidence in the Qur'ān or the *sunnah* of the Prophet or upon which there had been '*ijmā*ᶜ.[1]

The Madīnans are said to have held that the husband's duty to support his wife in a manner customarily acceptable according to his wealth and station was one of the fundamental obligations of marriage. (Al-Bājī has a discussion of several pages on the details of such support taken from the *Mudawwanah*, "Al-Mawwāzīyah", "Al-ᶜUtbīyah", and other sources.) They held, furthermore, that marriage may be dissolved at the wife's request and she may retain her dowry whenever her husband causes her undue injury [*ḍarar*]. The husband's failure to support his wife in a manner customarily acceptable according to his wealth and station was regarded to be an instance of such undue injury.[2]

Apparently, however, there were no explicit *ḥadīth*

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[1]Ibn Rushd, (Istiqāmah), 2:51-52; cf. al-Bājī, 4:131.

[2]See al-Bājī, 4:126-132, 60-69; *Muwaṭṭa'*, 2:564-565; Ibn Rushd, (Istiqāmah), 2:51-52; az-Zurqānī, 4:141.

supporting the Madīnan position. But there is a Qur'ānic verse which requires the father to support his wife in a customarily acceptable fashion [bi-'l-maᶜrūf], which al-Bājī regards to be part of the background of the Madīnan position.[1] Al-Bājī and Ibn Rushd, however, do not support the Madīnan position by an appeal to textual sources of law but rather by rational argumentation pertaining to the legal purposes and requirements of marriage. The Kūfan critique of 'Abū Ḥanīfah and Sufyān ath-Thawrī according to Ibn Rushd that such a position would require explicit texts or 'ijmāᶜ is an indication that there were no such texts or, if so, that they were not mutually regarded to be authentic. Ibn Rushd states, however, that the Madīnan position was also held by the Companion 'Abū Hurairah. As Mālik cites in the above text from the Muwaṭṭa' it was also the opinion of the prominent Madīnan Successor Saᶜīd ibn al-Musayyab.[2]

Saᶜīd ibn al-Musayyab, however, is reported in the Mudawwanah to have regarded this precept to be a part of the sunnah and not just opinion. A woman is reported to have complained to ᶜUmar ibn ᶜAbd-al-ᶜAzīz during the time that he was governor of Madīnah that her husband was not supporting her. ᶜUmar ibn ᶜAbd-al-ᶜAzīz verified the truth of her claim and made the decision that her husband should be given

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[1]Qur'ān, 2:233.

[2]See Ibn Rushd, (Istiqāmah), 2:51-52; al-Bājī, 4:126, 131.

about two months to rectify the situation. If he could not do so within that period, his wife would be separated from him. ᶜUmar ibn ᶜAbd-al-ᶜAzīz is said to have then sent word of his decision to Saᶜīd ibn al-Musayyab to ask his opinion of it, who is reported to have replied that ᶜUmar's decision was correct because it was the sunnah. Saḥnūn adds that Mālik's teachers Yaḥyā ibn Saᶜīd and Rabīᶜah also held to the validity of this precept.[1]

According to this report from the Mudawwanah, one could classify this precept as ᶜamal naqlī; Mālik does not, however, give any clear indication in the Muwaṭṭa' of his having regarded it as such. One cannot determine from the information he gives whether the precept was the product of the sunnah of the Prophet or of later ijtihād. If one regards it to be part of the ᶜamal naqlī, this precept would be another example of such a precept in Madīnan ᶜamal regarding which there were few if any explicit textual references and regarding which there had been differences of opinion among the early fuqahā'. Again, Mālik cites this reference to the people of knowledge of Madīnah--ẋdIb--after a transmitted report, in this case from a Madīnan Successor, and he adds nothing additional to that precept as reported in the text he cites other than to indicate that it was supported by the local consensus of the Madīnan fuqahā'.

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[1]Mudawwanah, 2:194 (15); az-Zurqānī cites a report from Ibn 'Abī Shaibah holding that this precept was sunnah, az-Zurqānī, 4:141.

7. xdIb: Regarding the Banishment of Fornicators

> Mālik cites an 'athar which reports that the caliph 'Abū Bakr punished an unmarried man who admitted to having fornicated with a slave girl and then banished him to the town of Fadak about two days journey to the north of Madīnah. Mālik follows this 'athar by a discussion of why one is required to accept later denials of those who admit to having fornicated or having committed adultery. He then states that it is the xdIb that there is no banishment in the case of slaves [ᶜabīd] who are found guilty of fornication.[1]

This precept is another point of difference between 'Abū Ḥanīfah and the Madīnans. 'Abū Ḥanīfah held that banishment was not part of the punishment of fornication under any circumstances. Ibn Rushd and az-Zurqānī state that there is an isolated ḥadīth which is regarded to be authentic which states that the Prophet banished a male fornicator from Madīnah who was a freeman for a period of one year after having punished him by flogging. Ibn Rushd holds that 'Abū Ḥanīfah knew of this ḥadīth but did not follow it because of his position regarding isolated ḥadīth that constitute the only evidence for punishments [ḥudūd].[2] Az-Zurqānī states that some later Ḥanafīs also claimed that the ḥadīth in question had been abrogated. Although I have no evidence that the early Ḥanafīs also made such a claim, the claim of abrogation could account for why Mālik cites the 'athar reporting that 'Abū Bakr enforced the precept, since it indicates that 'Abū Bakr, who took this action after the Prophet's death,

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[1]Muwaṭṭa', 2:826.

[2]For these stipulations, see appendix 1.

had not regarded the precept as having been abrogated. Az-Zurqānī cites information from later ḥadīth compilations to indicate that the Prophet had enforced this precept, that both 'Abū Bakr and ᶜUmar ibn al-Khaṭṭāb had enforced it after him, and that it was part of the sunnah of the Prophet.[1]

In the light of the additional information provided by Ibn Rushd and az-Zurqānī this precept would appear to be of the category of ᶜamal naqlī. There is no clear indication of that in the Muwaṭṭa', however, unless one argue that Mālik is using his 'athar from the prominent Companion 'Abū Bakr as an indication of the Prophetic sunnah, which is a fundamental part of Mālikī legal theory.[2] Although there is some question as to the source of this ᶜamal, Mālik's indication that it is part of Madīnan local consensus is clear from his use of the term ẋdIb.

In this example, Mālik provides information from the consensus of the people of knowledge of Madīnah which clarifies the meaning of the report that he cites about 'Abū Bakr. That text is a report of an action or, more properly speaking, a report of an isolated ruling [qaḍīyat ᶜain] which 'Abū Bakr made.[3] Mālik provides the information that banishment, which 'Abū Bakr required of the young man, does not pertain to slaves. This precept is indicated in the text but is not explicit. For the text mentions that the

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[1]See Ibn Rushd, 2:263 (5); az-Zurqānī, 5:96-98.

[2]See above, pp. 161-170. [3]See above, pp.188-195.

partner in the act of fornication had been a virgin, unmarried slave girl who had become pregnant as a result. Although the text reports that 'Abū Bakr banished the man who confessed to his guilt, it makes no mention of the slave girl. Thus, in this case Mālik relies upon the ᶜamal of Madīnah supported by the consensus of its people of learning to clarify the meaning of a text which in itself is of ambiguous meaning.

According to Ibn Rushd, Mālik's position is that banishment in cases of fornication as an additional part of the punishment pertains only to free men and not to slaves or free women, who would be exposed to even greater harm by virtue of banishment. This was a point of difference between ash-Shāfiᶜī and the Mālikīs, because ash-Shāfiᶜī regarded the texts reporting that the Prophet and the first two caliphs banished free men guilty of fornication to be of general applicability in the absence of textual proof to the contrary.[1] Thus, he held that banishment applied to all fornicators, men, women, and slaves.[2]

Conclusions

The references to the Madīnan people of knowledge which I have surveyed in this chapter are of the categories

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[1]For discussion of this presumption in ash-Shāfiᶜī's reasoning of the generality of texts, see above, pp. 139-140.

[2]Ibn Rushd, 2:263 (5). Ibn Rushd refers to the Mā-

of -zĀIb ["wa hādhā 'l-'amr al-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm bi-baladinā;" this is the 'amr which the people of knowledge in our city have always been following] and x̄dIb ["wa ᶜalā hādhā 'adraktu 'ahl al-ᶜilm bi-baladinā;" I encountered the people of knowledge in our city holding to this matter]. I have analyzed examples of these usages when they occur in isolation from other terms--sunnah and 'amr terms and so forth with which they often occur. References to the Madīnan people of knowledge are contained in some of the examples studied in the remainder of this analysis of Mālik's terminology.[1]

The terms -zĀIb and x̄dIb appear to me to be indications of Madīnan local consensus, and I have found no evidence of differences of opinion among the Madīnans regarding precepts for which Mālik uses these terms. The term -zĀIb, which in the examples I have considered is used in connection with ḥadīth and closely related āthār, indicates a continuity of Madīnan 'ijmāᶜ on the precept in question over the generations. The term x̄dIb does not give the same indication, in terms of its wording, of a continuous Madīnan consensus on the precept in question. Rather, it indicates that, at least by the time of the generation prior to Mālik, local consensus had been reached on the matter.

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likī position regarding not banishing women as "al-qiyās al-maṣlaḥī" [qiyās based on the principle of maṣlaḥah].

[1]See below, p. 616.

It is conceivable that Mālik uses the term x̄dIb for matters upon which consensus had not been reached among the Madīnan people of knowledge until after the first generations, but so far I have no evidence of its being used that way. Furthermore, it is also conceivable that the terms -zĀIb and x̄dIb do not stand for total consensus--such as I believe to be indicated by terms like S-XN, A-XN, AMN-X, and so forth, which negate the presence of differences of opinion--but rather that they stand for majority consensus [ijtimā^c], which, as I have suggested, may be what Mālik has in mind by the expression AMN.[1]

The precepts of each of the examples studied in this chapter were points of difference between the Madīnans and important early, non-Madīnan fuqahā'. As in the case of the sunnah precepts studied earlier--two-thirds of which were points of difference with 'Abū Ḥanīfah and sometimes also with Sufyān ath-Thawrī and al-Laith ibn Sa^cd and al-'Awzā^cī and others[2]--most, but again not all, of the precepts studied in this chapter were points of difference with 'Abū Ḥanīfah. Again in two of these examples both 'Abū Ḥanīfah and Sufyān ath-Thawrī are reported to have disagreed with the Madīnan position.[3] Others of these precepts, however,

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[1]See above, pp. 424-428.

[2]See above, pp. 556-557, 562, 565-566, 573.

[3]See above, pp. 586-587, 592-593, 603, 606.

were points of difference with Ibn ᶜAbbās and, in one case, possibly ᶜAlī ibn 'Abī Ṭālib as well[1] and, in another example, Ṭāwūs, Makḥūl, Mujāhid, and ᶜAṭā' ibn 'Abī Rabāḥ.[2]

The -zĀIb precepts seem clearly to fall in the category of what later legal theorists called ᶜamal naqlī [ᶜamal going back to the Prophet]. Three of the examples are supported by ḥadīth which Mālik cites;[3] another of them is used in association with a ḥadīth, which, however, does not contain the precept but pertains to the same question, and āthār of prominent Companions which Mālik is probably using as indications of the normative sunnah.[4] The sources of the xdIb precepts are not as clear, at least within the context of the materials provided in the Muwaṭṭa'. Az-Zuhrī states that the first of these precepts is sunnah, but the ḥadīth which Mālik cites to support az-Zuhrī's position does not contain az-Zuhrī's precept explicitly.[5] I could find no explicit ḥadīth regarding dissolving the marriage of a man who fails to support his wife or the precept of exempting slaves from banishment when they are guilty of fornication. Again, however, Saᶜīd ibn al-Musayyab is said to have regarded the first of these to be sunnah, while the practice of

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[1]See above, pp. 590-591, 597-598.

[2]See above, pp. 601-602. Mālik also disagrees with Ṭāwūs on one of the sunnah precepts; see above, p. 558.

[3]See above, pp. 589, 592, 596. [4]See above, pp. 585-589.

[5]See above, pp. 599-600.

banishing fornicators is reported to go back to the Prophet, and 'Abū Bakr, according to the information Mālik provides in the Muwaṭṭa', would have had to determine whether or not to apply that ruling in the case of a slave.[1] Thus, if one regards these ẋdIb precepts as instances of ᶜamal naqlī, they would be further illustrations of well-established ᶜamal going back to the era of the Prophet for which there were no explicit early texts.[2] Furthermore, from the manner of Mālik's presentation of this material in the Muwaṭṭa'--especially the ẋdIb precepts analyzed in this chapter--the primary information that he seems to want to communicate about them is that they are part of the local consensus of the Madīnan people of knowledge.

Despite the lack of explicit early texts to support many of the precepts of this chapter, the role of texts in these precepts--āthār of Companions or statements of prominent Madīnan Successors--is much more distinctive than in the preceding chapter on the sunnah terms. For most of the precepts studied in that chapter there were no explicit texts at all, and even when there were texts Mālik provided extensive additional information on the precepts in question from the non-textual source of Madīnan ᶜamal. In this chapter, on the contrary, Madīnan ᶜamal supported by the consensus of the Madīnan people of knowledge is used primarily to sup-

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[1]See above, pp. 604-605, 606-608.

[2]Cf. above, pp. 577-581.

port the validity of precepts which are set forth in the texts that Mālik cites or reflected in the actions reported in those texts. In some cases, however, Mālik relies on Madīnan ᶜamal to validate the interpretation which he gives these texts, especially when the texts or interpretations are conjectural. Many of the texts cited in this chapter, for example, are reports of actions, which from the standpoint of Mālikī legal theory are regarded to be of conjectural meaning in themselves.[1] ᶜAmal is used to verify, for instance, that certain actions which prominent Companions are reported to have done are regarded by the Madīnan people of knowledge to constitute the desired norm.[2] Even the precept regarding not banishing slaves may be said to be indicated by the text Mālik cites regarding a ruling 'Abū Bakr handed down regarding a man who had fornicated with a slave girl; nevertheless, that precept is not at all clear in the text which Mālik cites.[3] In the case of two quite explicit statements which Mālik transmits from the Prophet, he supports by reference to the continuous ᶜamal of the Madīnan people of knowledge an interpretation of those texts which is contrary to their obvious [ẓāhir] meaning.[4]

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[1]See above, pp. 188-195. [2]See above, pp. 588-589.

[3]See above, pp. 607-608. [4]See above, pp. 592-596.

CHAPTER IX

REFERENCES TO ᶜAMAL

General Observations

The word ᶜamal does not occur much in the Muwaṭṭa' in comparison with the words 'amr and sunnah or Mālik's references to the people of knowledge of Madīnah. I have indexed only fourteen terminological expressions that contain the word ᶜamal. These expressions fall into two categories: 1) affirmative ᶜamal terms and 2) negative ᶜamal terms. There are seven examples in the Muwaṭṭa' of each of these categories. The affirmative ᶜamal terms are those usages containing the word ᶜamal which affirm that the precept in question is part of the ᶜamal of Madīnah. The expression ᶜamal an-nās [AlNs; the ᶜamal of the people] occurs four times in these seven examples. The seven negative ᶜamal terms are those usages containing the word ᶜamal which state that ᶜamal is not in accordance with the matter in question. The expression "laisa ᶜalaihi 'l-ᶜamal" [Al-x̄; ᶜamal is not in accordance with this] occurs five times. Both the affirmative and negative ᶜamal terms occur in a wide variety of chapters and subject matter, both those which pertain to acts of worship and those which pertain to social transactions.

The most common occurrence of the word ᶜamal in the Muwaṭṭa' is not in terminological expressions such as these, which are used in reference to specific texts which Mālik cites, but rather in the wording of twenty-nine chapter titles entitled "Al-ᶜAmal fī [x]" [Al x; the ᶜamal regarding "x"], in which the symbol "x" stands for the subject matter of the chapter. With a few exceptions, these chapters pertain to fundamental acts of worship and rituals--how to perform ablutions, how to make certain types of prayers, what is required when making voluntary vows [nudhūr], the sacrificing of an animal upon the birth of a child [ᶜaqīqah], and so forth.[1] An index of these ᶜamal chapters is provided in appendix 2. The ᶜamal chapters occur most frequently in the first two books of the Muwaṭṭa', which pertain to ablutions and ritual purification [ṭahārah] and prayer [ṣalāh]. These two books, although among the longest in size in the Muwaṭṭa', contain the least amount of terms.

Affirmative ᶜAmal Terms

1. AlNs:[2] Paying for Animals to Be Delivered at a Later Date

Mālik states that it is permissible to buy animals before they are delivered, if the date of delivery

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[1]The exceptions: "Al-ᶜAmal fī 'd-Diyah" [ᶜamal regarding indemnities (for murder)], which pertains to what the size of such indemnities should be in terms of gold and silver; Muwaṭṭa', 2:850. And, "Al-ᶜAmal fī 'l-'Asnān" [ᶜamal regarding indemnities for teeth]; ibid., 2:862.

[2]The expression in full is: "Wa lam yazal dhālika min ᶜamal an-nās al-jā'iz bainahum wa 'l-ladhī lam yazal ᶜalaihi

is stipulated, if the animal to be delivered is described, and if the price is paid in full. Mālik then states that this has always been the ᶜamal of the people and that the people of knowledge in Madīnah have always regarded it to be permissible.[1]

This precept is related to a preceding AMN precept--supported by āthār of prominent Companions and a statement from az-Zuhrī--pertaining to trading animals for each other. The precept above differs from this AMN precept in that the above precept pertains to buying animals with money. Furthermore, in the preceding precept it is the animal which is bought that is delivered immediately, while the animals to be traded for it come later. In the above precept, however, it is the price which is paid in advance, and the animal which is purchased is delivered later.[2] The chapter which immediately follows this precept also pertains to it. In that chapter Mālik explains that it is not permissible for the seller to receive the price in advance when he is selling a specific animal to be delivered at a later time, even though the buyer may personally have seen that animal and be satisfied with what he saw. For the condition of that animal may alter or have altered by the time of delivery. Therefore, the animal must be sold by description, and the seller must

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'ahl al-ᶜilm bi-baladinā" [this has always been part of the ᶜamal of the people and regarded to be permissible between them; the people of knowledge in our city have always held to its validity; -zx]AlNs: -zxIb].

[1]Muwaṭṭa', 2:653.

[2]Ibid., 2:652-653. For discussions see al-Bājī, 5:19-21; az-Zurqānī, 4:254-256; Ibn Rushd,(Istiqāmah), 2:124-125, 132-134.

be held to fulfilling the description which he gives.[1]

Al-Bājī states that this precept constitutes a point of difference between the Madīnans and Iraqis, without, however, going into detail on what the nature of the difference was.[2] Thus, this would appear to be another instance of Mālik's citing terms for precepts that were points of difference between Madīnans and non-Madīnans.

Both terms which Mālik uses in speaking of this precept indicate that it is a fundamental type of Madīnan ᶜamal and that it has continuity with the past. The expression -zxIb, like the -zĀIb terms studied in the preceding chapter, indicates that the consensus of the people of knowledge of Madīnah on this matter also goes back over the generations. Mālik cites no specific texts containing the precept. Nevertheless, it is of the nature of ᶜumūm al-balwā, since transactions of this kind pertaining to selling animals were surely part of the economic life of Madīnah in both the pre-Islamic and Islamic period. This precept, therefore, would appear to fall in that category of ᶜamal naqlī which al-Qāḍī ᶜAbd-al-Wahhāb and ᶜIyāḍ describe as going back to the tacit approval ['iqrār] of the Prophet.[3] The continuous consensus of the Madīnan people of knowledge on the precept is an indication of such tacit approval, on the presumption that

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[1]Muwaṭṭa', 2:654; see az-Zurqānī, 4:258.

[2]Al-Bājī, 5:21. [3]See above, pp. 410-415.

they would not all have been ignorant of the Prophet's having prohibited such transactions if he had actually done so, and, if they had known them to be prohibited, some objection would have been made to these transactions. Thus, this example would appear to be an instance of how, according to Ibn Rushd, Mālik uses Madīnan ᶜamal in a manner cognate to 'Abū Ḥanīfah's use of the concept of ᶜumūm al-balwā.[1]

Finally, this ᶜamal precept, cited as it is in the absence of explicit supporting textual sources of law, would be another instance of Mālik's reliance upon the non-textual source of Madīnan ᶜamal to provide information for which there were few, if any, texts.

2. AlNs: the Definition of What Lands Are Suitable for Musāqāh[2]

Mālik concludes a lengthy chapter pertaining to the precept of musāqāh by defining at what point it becomes prohibited to make a contract of musāqāh on lands that contain both 'uṣūl [fruit trees, established grapes, and the like, or standing crops] and baiḍā' [open land upon which no crops have appeared]. Mālik states that the contract of musāqāh may be engaged in for farming such lands as long as the baiḍā' portions make up one-third

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[1]See above, pp. 403-409, 448-453, 184-188.

[2]Musāqāh: A type of contract whereby the owner of a piece of land containing fruit trees, date palms, grapes, and the like or standing crops agrees to let the laborer share in one half the produce of the land or some other share upon which they agree, on the condition that the laborer tend to the watering of the land and necessary maintenance. Mālik forbids such a contract to be made upon baiḍā' lands, i.e., open lands upon which there are no standing crops or established trees or vines. For with baiḍā' lands there is an additional risk that the crop which has been planted will not come forth or will be very small when it does. With baiḍā' lands, the proper contract, according to Mālik, is that of rental [kirā'] or paying wages.

or less of the total land upon which the contract is being made. Mālik upholds the validity of this precept by stating that it has been part of the custom of the people ['amr an-nās] that they do musāqāh on lands that contain some baiḍā' portions. He then draws an analogy between permitting contracts of musāqāh on lands that contain some baiḍā' and types of buying and selling in which one pays in gold or silver coin for copies of the Qur'ān, swords, rings, and the like which are embellished with gold or silver.[1] Such types of transactions, Mālik continues, are permissible and are frequently engaged in by the people. Furthermore, nothing has come down stipulating at exactly what point such transactions should become forbidden. Nevertheless, the AN regarding such matters which has been the ᶜamal of the people [ᶜamal an-nās] is that the gold or silver in such articles must not constitute in terms of its value more than one-third the value of the entire item.[2]

According to Ibn Rushd, this precept constituted a point of difference between Mālik, on the one hand, and 'Abū Yūsuf, ash-Shaibānī, Sufyān ath-Thawrī, Ibn 'Abī Lailā,[3] and al-Laith ibn Saᶜd, on the other. For, although they regarded it to be permissible for contracts of musāqāh to be made

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[1]To understand this analogy it is necessary to know that the general precept of Islamic law regarding transactions involving gold and silver is that gold cannot be exchanged for gold or silver for silver except in equal quantities and in simultaneous transactions. Purchasing copies of the Qur'ān and so forth that are embellished with gold is an instance of exchanging gold for gold, if one makes the purchase with gold coin. The Madīnan custom in the matter, however, is that such transactions are permissible as long as the value of the gold or silver with which the embellishment is done does not exceed one-third the value of the price of the article and as long as no credit is involved in the purchase; Muwaṭṭa', 2:636. Thus, both precepts are exceptions from general precepts--i.e., types of istiḥsān--and in both cases there is the characteristic stipulation of one-third or less.

[2]Muwaṭṭa', 2:708-709.

[3]For data on Ibn 'Abī Lailā, see above, p. 129, n. 1.

on lands that contained baiḍā' portions in addition to 'uṣūl, they did not agree with Mālik's stipulation that the baiḍā' portions must be one-third or less of the total.[1]

Mālik's stipulation of one-third or less may, however, be his own ijtihād or that of other Madīnan fuqahā'. The terms that Mālik uses in this example are not used in such a way as to indicate that the stipulation of one-third or less has itself come down as part of the Madīnan ᶜamal regarding musāqāh. Rather, what Mālik says is that it is the ANs ['amr an-nās] that the people do musāqāh on lands of 'uṣūl which contain some baiḍā' portions. Furthermore, he indicates earlier that these portions of baiḍā' must be a subsidiary [tabᶜ] part of the entire property. Mālik's stipulation of one-third or less of the total is a definition of what he means by "subsidiary".[2] It would appear from the text, however, that this definition of "subsidiary" is the derivative of analogical reasoning based on another established precept of Madīnan ᶜamal--namely, that of selling copies of the Qur'ān, swords, rings, and the like which are embellished with gold or silver for gold or silver coin. Mālik describes this precept of selling items embellished with gold or silver earlier; he describes it as an established

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[1]Ibn Rushd, (Istiqāmah), 2:243. He does not state what portions these fuqahā' regarded to be acceptable.

[2]Muwaṭṭa', 2:707.

part of Madīnan ᶜamal having continuity with the past: "Wa lam yazal dhālika min 'amr an-nās ᶜindanā" [and this has always been part of the custom of the people (ANs) among us].[1] The second part of Mālik's terminological expression in this example on musāqāh provides information about the ANs pertaining to selling items embellished with gold or silver. Mālik explains that such types of contracts of buying and selling have always been permissible and that nothing has come down stating specifically at what point such types of contracts should be forbidden. (Al-Bājī states that Mālik means by this that no texts have come down in the matter.[2]) Nevertheless, the AN which has been the ᶜamal of the people, Mālik states, is that the gold or silver must not exceed in value one-third the total value of the item which it embellishes.[3]

The parts of these precepts to which Mālik's terms refer appear to be parts of Madīnan ᶜamal naqlī--namely, that it is part of the custom of the people to do musāqāh on lands containing subsidiary portions of baiḍā' land and that it is part of the custom of the people to sell items embellished with gold or silver for unequal weights of gold or silver coin, as long as the value of the gold and silver used in the embellishment does not exceed one-third the total price

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[1]Muwaṭṭa', 2:636. [2]Al-Bājī, 5:138.

[3]For an explanation of the analogy itself, see above, p. 619, n. 1, and p. 618, n. 2.

of the item. Both of them constitute matters that are of the nature of ᶜumūm al-balwā. In the case of selling items embellished with gold and silver for gold or silver coin as long as the gold and silver with which they are embellished does not exceed one-third the overall value of the item, Mālik indicates that no texts have come down in the matter stipulating that one-third is the limit beyond which it is impermissible to go. Nevertheless, that stipulation has been taken from Madīnan ᶜamal. Thus, in that precept Mālik has relied upon the non-textual source of Madīnan ᶜamal for details that are not provided in the textual sources of law, and he has apparently transferred that stipulation by analogy to the definition of what kinds of lands the contract of musāqāh may be practiced on.

Finally, both of these precepts are instances of istiḥsān, although in both cases the istiḥsān is an old part of Madīnan ᶜamal. For in both cases exceptions are made to general precepts. The general precept in musāqāh is that it is not permissible on baiḍā' lands, and the general precept in the other case is that gold cannot be exchanged for gold or silver for silver except in equal quantities and in simultaneous transactions, that is, without credit--which is part of the Islamic prohibition of ribā [usury].[1]

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[1]See above, pp. 245-254.

3. AlNs:[1] Regarding the Contract of Mukātabah[2]

> Mālik states that he has heard some of the people of knowledge say regarding the Qur'ānic verse: " . . . and give unto them of the wealth of God which He has given unto you,"[3] that it refers to the usage whereby the master exempts the slave from having to pay part of the remaining portion of the money which the slave had agreed to pay in order to obtain his freedom. Mālik reiterates that this is what he has heard from the people of knowledge and that he found the ᶜamal of the people to be in accordance with it. Mālik then cites an 'athar which reports that ᶜAbd-Allāh ibn ᶜUmar made a contract of mukātabah with a slave of his according to which the slave would pay him 35,000 pieces of silver in order to earn his freedom. When the slave neared completion of the payments, Ibn ᶜUmar exempted him from paying the last 5,000.[4]

According to the information in Ibn Rushd and al-Bājī, this precept constituted a point of difference between some of the early fuqahā', including Madīnans. Some held, as Mālik does in the above precept, that it is the master who is to exempt the slave from paying the remaining portion of his mukātabah, and in that case the master would carry whatever

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[1]The expression in full is: "Wa samiᶜtu baᶜḍ 'ahl al-ᶜilm yaqūl fī . . . Fa-hādhā 'l-ladhī samiᶜtu min 'ahl al-ᶜilm wa 'adraktu ᶜamal an-nās ᶜalā dhālika ᶜindanā" [I have heard some of the people of knowledge say regarding . . . This is what I have heard from (some of) the people of knowledge, and I encountered the ᶜamal of the people among us to be in accordance with it].

[2]Mukātabah: A contract between master and slave according to which the slave agrees to pay the master a certain sum in installments over a set period of time in order for the slave to purchase his freedom. The slave is free to find employment and is freed as soon as he meets the payments, even if that be prior to the deadline agreed upon.

[3]Qur'ān, 24:33. The verse pertains to mukātabah, which is clear from its context.

[4]Muwaṭṭa', 2:788.

financial loss were accrued by the exemption. Others held, however, that this verse meant it was the Muslim community [jamāᶜat al-muslimīn] which was to help the slave pay the final portion of the mukātabah.[1] ᶜUmar ibn al-Khaṭṭāb is reported to have held that this verse meant that the slave was to be given money from zakāh. Similarly, the Madīnan faqīh Zaid ibn 'Aslam[2] is said to have held that this verse meant that the 'amīr [city governor] was to give the slave money from zakāh, while the master need give nothing.[3]

In light of such information, the above example is an instance of Madīnan ᶜamal upon which there were differences of opinion in Madīnah. Mālik gives no indication in his terminological expressions that this precept was part of Madīnan 'ijmāᶜ; rather, he states that he has heard it from some of the Madīnan people of knowledge, indicating thereby that he may have heard the contrary from others, such as, perhaps, his teacher Zaid ibn 'Aslam. Mālik cites the 'athar of Ibn ᶜUmar as a reflection of the precept; it is, however, a report of an action and, hence, would not be regarded as conclusive in itself, according to Mālikī legal theory.[4]

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[1]Ibn Rushd, (Istiqāmah), 2:369.

[2]ZAID IBN 'ASLAM al-ᶜAdawī (d. 136/753) was a famous Madīnan Successor and one of the prominent Madīnan fuqahā' of his generation; he was also known as a Qur'ānic commentator. Part or all of his commentary is contained in aṭ-Ṭabarī. Zaid studied from several prominent Companions, and Mālik was one of his students. Mālik transmits over 51 transmissions from Zaid ibn 'Aslam in the Muwaṭṭa'. Sezgin, 1:406-407.

[3]Al-Bājī, 7:7-8. [4]See above, pp. 188-195.

Mālik apparently regards Ibn ᶜUmar's action, however, to be a reflection of his interpretation of the pertinent Qur'ānic verse, which he cites prior to that. Mālik's chief reliance in interpreting the verse, however, is upon the opinion of some of the Madīnan people of knowledge and the fact that their opinion is also the ᶜamal of the people.

This example is another instance of Mālik's use of the non-textual source of ᶜamal as a reference in the interpretation of a Qur'ānic text of conjectural meaning. The Qur'ānic text makes it quite clear that the slave doing mukātabah should be given some "of the wealth which God has given", but it does not specify who it is who should be responsible for giving that wealth to the slave, although, according to al-Bājī, the obvious [ẓāhir] meaning of the text is that it is the master of the slave.[1]

Mālik probably regarded the Madīnan ᶜamal in this case to go back to the Prophetic era, as reflected in the Qur'ānic verse and the action of Ibn ᶜUmar. Nevertheless, the source of the ᶜamal would be much more conjectural in this instance than in instances of ᶜamal naqlī upon which there had been 'ijmāᶜ in Madīnah, because of the disagreements of such prominent Madīnans as ᶜUmar ibn al-Khaṭṭāb and Zaid ibn 'Aslam.

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[1]Al-Bājī, 7:8.

4. The Inheritance of Heirs Who Perish in Battles or Calamities

> Mālik sets forth the precept that heirs who have mutual rights of inheritance [mutawārithūn] and who perish together in calamities such as shipwrecks, battles, and the like do not receive formally the shares of inheritance which they would have received from each other, as long as it is not known which of them died before the other. Rather, their properties are divided directly among those of their heirs who are still living. Mālik introduces this precept with the expression: "This is the 'amr regarding which there are no differences of opinion and no doubts among any of the people of knowledge in our city, and the ᶜamal is in accordance with it."[1] After citing the precept, Mālik states: "It is not meet that anyone inherit anyone else on the basis of doubt; rather, inheritance is distributed only on the basis of certainty by way of knowledge and testimony."[2]

Mālik indicates quite emphatically that this precept is a part of Madīnan local consensus. According to Ibn Rushd, however, it was a point of difference between the Madīnans and the majority of Kūfan and Baṣran fuqahā'. There are reports that both ᶜAlī ibn 'Abī Ṭālib and ᶜUmar ibn al-Khaṭṭāb held opinions contrary to this precept. Most reports have it that 'Abū Ḥanīfah disagreed with the Madīnans on this issue. But according to the famous Ḥanafī aṭ-Ṭaḥāwī,[3] 'Abū

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[1]"Wa dhālika 'l-'amr al-ladhī lā 'khtilāf fīhi wa lā shakk ᶜinda 'aḥad min 'ahl al-ᶜilm bi-baladinā, wa ka-dhālika 'l-ᶜamal."

[2]Muwaṭṭa', 2:521. This precept has important legal bearing because lots of inheritance are set by Islamic law. The largest proportions go to those who are nearest to the deceased by way of marriage or kinship, and some heirs exclude others from inheriting in their presence. Thus, the sequence in which heirs die can effect greatly the proportions of their properties which the remaining heirs will receive.

[3]'Aḥmad ibn Muḥammad ibn Salāmah AṬ-ṬAḤĀWĪ (239-321/

Ḥanīfah held the same opinion as the Madīnans. According to the contrary Kūfan and Baṣran points of view, however, the properties of mutual heirs who perish together in battles, calamities, and the like are readjusted by distributing to each of them the portion that he would have received from the property of the others and by distributing his property to them according to what they would have received. The remaining heirs then inherit their shares from the readjusted estates of the deceased according to their nearness to them in kinship or marriage.[1]

The Madīnan ᶜamal in this precept goes back at least as far as the caliphate of ᶜAlī ibn 'Abī Ṭālib. Mālik cites a report prior to it according to which his teacher Rabīᶜah stated that many of the people of knowledge of Madīnah had transmitted to him that this precept was the procedure which the Madīnans followed concerning those of their dead who were killed in the Battle of the Camel (36/656), Ṣiffīn (37/657), al-Ḥarrah (63/683), and Qudaid (72/692).[2] The ᶜamal

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853-933) was born in Upper Egypt and studied first under his maternal uncle, the famous student of ash-Shāfiᶜī, al-Muzanī. Later, however, aṭ-Ṭaḥāwī left the Shāfiᶜī school for the Ḥanafī, studying under famous Egyptian and Syrian Ḥanafīs of the time. He was most famous as a faqīh but was also a renowned muḥaddith. He transmitted the Musnad of ash-Shāfiᶜī from his uncle, al-Muzanī. Sezgin, 1:439.

[1]Ibn Rushd, (Istiqāmah), 2:348-349.

[2]Muwaṭṭa', 2:520. The Battle of the Camel took place between the caliph ᶜAlī and az-Zubair, Ṭalḥah, and ᶜĀ'ishah, whose demand was that the death of ᶜUthmān must be revenged. Az-Zurqānī estimates that almost a thousand Makkans and Ma-

in this instance, according to al-Bājī, goes back to the consensus of the Companions--he makes no mention of reports that ᶜUmar ibn al-Khaṭṭāb and ᶜAlī ibn 'Abī Ṭālib held opinions to the contrary. Rather, al-Bājī states that this was the procedure which was followed upon the death of ᶜAlī's daughter by Fāṭimah, 'Umm Kulthūm, who was the wife of ᶜUmar ibn al-Khaṭṭāb. 'Umm Kulthūm is reported to have died so close to the time of the death of her son Zaid ibn ᶜUmar that it was not known which had died first. Thus, according to al-Bājī, the remaining heirs inherited from them directly.[1]

It appears on the basis of the evidence I have found that the precept in this example is an instance of what later legal theorists referred to as ᶜamal qadīm [ancient ᶜamal], that is, Madīnan ᶜamal that had not originated with the Prophet but went back to the ijtihād of his Companions.[2]

It is also interesting how, in this example, Mālik articulates the general precept of inheritance which he believes to underlie this precept, namely, that inheritance

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dīnans died in that battle. Ṣiffīn took place in Iraq between the armies of ᶜAlī and Muᶜāwiyah; many Madīnans were in the army of ᶜAlī. Al-Ḥarrah was probably the bloodiest of these in so far as the Madīnans were concerned. It resulted after their expulsion of an 'Umayyad governor who had been ruling on behalf of Yazīd ibn Muᶜāwiyah. Al-Ḥarrah was a place just outside Madīnah; thousands of Madīnans were killed, and after the battle the residents of Madīnah were exposed to destruction. Qudaid was the battle in which az-Zubair was killed while fighting the Syrian troops of al-Ḥajjāj. Az-Zurqānī, 3:449-450; see Wakīᶜ, 1:123.

[1]Al-Bājī, 6:253. [2]See above, pp. 415-419.

is only to be distributed on the basis of certain knowledge. As mentioned earlier, Ibn al-Qāsim refers back to this precept at several times in the Mudawwanah to explain his ijtihād or that of Mālik on verious questions pertaining to laws of inheritance.[1]

Negative ᶜAmal Terms

1. Al-x: Regarding Sujūd al-Qur'ān[2]

> Mālik cites a report according to which ᶜUmar ibn al-Khaṭṭāb once recited a verse of the Qur'ān which contained a sajdah [prostration] while he was speaking to the people from the minbar [pulpit] during the Friday prayers. After reciting the verse, ᶜUmar descended from the minbar, prostrated himself, and the people prostrated themselves with him. But the next Friday--the report continues--ᶜUmar recited the same verse from the minbar. The people began to prepare themselves for prostration. ᶜUmar told them, however: "'ᶜAlā rislikum' [take it easy], God has not made it binding upon us to do it, unless we desire to." ᶜUmar did not prostrate himself, and he prohibited the people from doing so. Mālik follows this report by saying that it is not in accordance with the ᶜamal that the 'imām come down from the minbar, after reciting a sajdah verse, and prostrate himself.[3]

According to al-Bājī this precept constituted a point of difference between the Madīnans and 'Abū Ḥanīfah, who held that it was obligatory [wājib] for one to prostrate oneself after reciting any of the sajdah verses of the Qur'ān.[4]

Al-Bājī, Ibn ᶜAbd-al-Barr, and az-Zurqānī hold that

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[1]See Mudawwanah, 3:81 (12), 84 (22), 85 (10).

[2]Sujūd al-Qur'ān [the prostrations of the Qur'ān]: The name given to those verses of the Qur'ān after reading which one is supposed to prostrate oneself to God.

[3]Muwaṭṭa', 1:206. [4]Al-Bājī, 1:351.

ᶜUmar ibn al-Khaṭṭāb undertook the actions reported in this example in order to make clear to the people--many of whom would have been attending the obligatory Friday prayers--that it was not obligatory for them to prostrate themselves after reciting those verses of the Qur'ān that contained commands or other directions that one prostrate oneself. Ibn ᶜAbd-al-Barr is reported to have held that ᶜUmar probably did this because of fear that differences of opinion might arise over the issue. Al-Bājī and az-Zurqānī hold that ᶜUmar's teaching in this example constitutes part of the 'ijmāᶜ of the Companions because none of them is reported to have objected to what ᶜUmar said or did on this occasion.[1]

By stating what the ᶜamal is not, Mālik indicates that the ᶜamal of Madīnah in this matter is that the 'imām remain upon the minbar after reciting a sajdah verse and that he not prostrate himself. Thus, Mālik has indicated by reference to Madīnan ᶜamal which of the two actions of ᶜUmar ibn al-Khaṭṭāb which are reported in this 'athar is normative and which of them is not. ᶜUmar's action the first Friday of reciting the verse, descending from the minbar, and prostrating himself is not normative, according to Mālik. ᶜUmar's action the second Friday, however, of reciting the verse and then not prostrating himself is normative.

This is an illustration, therefore, of how Mālik re-

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[1]See al-Bājī, 1:350-351; az-Zurqānī, 2:196-197.

lies upon the non-textual source of Madīnan ᶜamal to interpret the textual sources of law to which he subscribes, for it is not completely clear from the text itself which of ᶜUmar's two actions should be regarded as normative. The fact that ᶜUmar states that it is not required for them to prostrate themselves after reciting sajdah verses might be interpreted as an indication that it should not become normative behavior for the 'imām to descend from the minbar and prostrate himself after reciting one. Nevertheless, there is no reason why something less than obligatory--for example, something highly recommended--should not be normative. It might also be observed that Mālik has relied upon ᶜamal in this instance to give the full interpretation of the meaning of actions which ᶜUmar is reported to have done.

The source of the ᶜamal in this instance is not completely clear. In terms of Mālikī legal theory, one would regard the precept that underlies the ᶜamal, namely, the precept that one is not required to prostrate oneself after reciting a sajdah verse, to go back to the Prophet, despite the fact that their is no explicit indication of it. ᶜUmar is reported to have said, "God has not made it binding upon us to do it . . .", and, according to Mālikī legal theory, statements such as these from prominent Companions are regarded as indications of the Prophetic sunnah, on the presumption that such Companions would not have made claims of this sort about God without having had knowledge from

the Prophet or the Qur'ān.[1]

Nevertheless, as just pointed out, it does not necessarily follow from this precept that the norm should be that the 'imām not descend from the minbar and prostrate himself after reciting a sajdah verse of the Qur'ān. Such an ᶜamal could have been instituted by the Prophet. That would seem unlikely, however, on the basis of the information which Mālik provides. There is no mention of the Prophet's having done it, and if, as al-Bājī, Ibn ᶜAbd-al-Barr, and az-Zurqānī suggest, ᶜUmar ibn al-Khaṭṭāb undertook his actions to make this precept clear to the people, it is all the more unlikely that the Prophet had established such an ᶜamal earlier. It would appear, rather, that the ᶜamal in this instance is the result of ᶜUmar's ijtihād based on his understanding of the implications of the precept that it is not obligatory for one to prostrate oneself after reading a sajdah verse of the Qur'ān. In that case, this example would appear to be of the category of what later legal theorists regarded as ᶜamal qadīm, instead of ᶜamal naqlī.[2]

2. Al-x̄: ᶜUmar's Letter to an Army Commander

Mālik cites a report according to which ᶜUmar ibn al-Khaṭṭāb sent a letter to a commander of one of his armies, telling him that word had reached him that some of the commander's soldiers had been tracking the enemy to their mountain hideaways. Finding them too well fortified, the Muslim soldiers would lure out the enemy by

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[1]See above, pp. 161-170. [2]See above, pp.410-419.

> telling them in Persian, "Have no fear." But when the enemy would come out, these soldiers would put them to death. ᶜUmar concludes the letter by saying that if he knew the whereabouts of soldiers such as these, he would put them to death. Yaḥyā ibn Yaḥyā states after this 'athar that he heard Mālik state that there was no consensus on the ḥadīth and that ᶜamal was not in accordance with it.[1]

According to al-Bājī, this precept constituted a point of difference between Mālik and 'Abū Yūsuf, who held the opinion of ᶜUmar ibn al-Khaṭṭāb as expressed in the letter, namely, that the Muslim soldiers should be put to death. 'Abū Ḥanīfah, however, is said to have held the same opinion on the matter as Mālik.[2]

This 'athar occurs in a short chapter in the Book of Jihād pertaining to fulfilling covenants of security ['amān] which one grants to the enemy. The precept itself pertains, as al-Bājī and az-Zurqānī point out, to the laws of ta'mīn, the process whereby Muslims grant security of life and property to non-Muslims within Muslim territory. The Muslim soldiers whom ᶜUmar ibn al-Khaṭṭāb has condemned have granted such ta'mīn to their Persian enemies by telling them the words, "Have no fear". But they have broken that covenant by killing the Persians after their surrender. All agree that what the Muslim soldiers have done is forbidden [ḥarām]; the point of difference, however, according to Mālik's commentators, is whether the Muslim soldiers should be punished with death for their crime.[3] The fact that Mālik regarded

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[1]Muwaṭṭa', 2:448-449. [2]Al-Bājī, 3:174.

[3]Ibid., 3:172-174; az-Zurqānī, 3:292-293.

what these Muslim soldiers had done to be wrong is indicated by the content of the remainder of the chapter. He indicates first that even a gesture of the hand is sufficient to indicate ta'mīn and that no words need be said at all. Thus, it stands to reason that Mālik would have regarded the statement of these Muslim soldiers to have been an even stronger indication of ta'mīn. After that, Mālik cites a statement of Ibn ᶜAbbās according to which he said that God will grant power to the enemy over any people that breaks the covenants that it makes treacherously.[1]

The 'athar which Mālik cites in this example is a Kūfan and not a Madīnan transmission. Mālik transmits it from "a man of the people of Kūfah," without stating specifically who he was. Az-Zurqānī also notes that the 'isnād is not complete; it does not mention the intermediary through whom this Kūfan received the report from ᶜUmar. Reports with 'isnād's of this type are, of course, very common in the Muwaṭṭa', and, as pointed out earlier, both Mālikī and Ḥanafī legal theory regard such transmissions to be valid as long as the persons mentioned in the 'isnād are acceptable.[2] Nevertheless, Mālik's statement that there is no consensus on this 'athar may be an indication that there was no general consensus among the Madīnans on its authenticity.[3]

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[1]Muwaṭṭa', 2:449. [2]See above, pp. 155-161.

[3]See az-Zurqānī, 3:292-293. Az-Zurqānī holds that this Kūfan is probably Sufyān ath-Thawrī; he also points out that an 'athar almost identical to this one has been transmitted in the

Az-Zurqānī states, furthermore, that some Mālikī fuqahā' held that the obvious [ẓāhir] meaning of ᶜUmar's letter is misleading. They held that ᶜUmar made the statement that he would put such soldiers to death as a threat to intimidate them from breaking covenants of security in the future. Thus, these fuqahā' claimed that ᶜUmar had not intended his statement to be taken literally and to be put into law.[1]

Whatever Mālik's reasons for rejecting the obvious implications of this 'athar may have been, it is clear that he rejects it by reference to ᶜamal. Ash-Shāfiᶜī agrees with Mālik's position, but he objects strongly to the fact that Mālik has rejected the implications of ᶜUmar's 'athar by reference to ᶜamal and without citing any legal texts to support his position. Ash-Shāfiᶜī holds, on the contrary, that the Muslim soldiers should not be put to death because of the precept mentioned in a ḥadīth that a Muslim is not to be put to death over a non-Muslim.[2] Mālik, however, does not subscribe to that precept completely, for he states in the Muwaṭṭa' that it is the AN that a Muslim will not be put to death over a non-Muslim, unless it is premeditated murder ["yaqtuluhū ghīlatan"].[3] According to this precept

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collection of al-Bukhārī from ᶜUmar ibn al-Khaṭṭāb.

[1]Az-Zurqānī, 3:293. As pointed out earlier, ẓāhir statements are regarded to be conjectural in Mālikī legal theory. See above, pp. 146-147.

[2]Ash-Shāfiᶜī, "Ikhtilāf Mālik," p. 241.

[3]Muwaṭṭa', 2:864.

of Mālik, therefore, it could be argued that the Muslim soldiers should have been put to death.

The ᶜamal to which Mālik appeals in this instance is clearly more authoritative than the text at hand, even though Mālik cites no other legal texts to support the ᶜamal. It is not clear, furthermore, what the source of this ᶜamal was.

3. Al-x̄: ᶜĀ'ishah on an Abrogated Qur'ānic Verse

> Mālik cites an 'athar from ᶜĀ'ishah according to which she said that there had been a verse in the Qur'ān stating that prohibition of marriage to the kin of one's wetnurse [i.e. by riḍāᶜah] became effective after ten nursings. This verse was then abrogated to five, and that verse was still being recited as part of the Qur'ān at the time of the Prophet's death. Yaḥyā ibn Yaḥyā states that he heard Mālik say regarding this report that ᶜamal was not in accordance with it.[1]

The position of Mālik on this matter of law was that prohibition in marriage by riḍāᶜah became effective by a single nursing, which is also said to have been the opinion of 'Abū Ḥanīfah, Sufyān ath-Thawrī, al-'Awzāᶜī, and others. In fact, Ibn ᶜAbd-al-Barr is said to have reported that, according to al-Laith ibn Saᶜd, there was consensus upon this matter among the Companions and the early fuqahā'.[2] Nevertheless, this position is contrary to the obvious [ẓāhir] meaning of ᶜĀ'ishah's text, and it may have been for that reason that Mālik states after this report that ᶜamal

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[1]Muwaṭṭa', 2:608.

[2]Az-Zurqānī, 4:184-185; Ibn Rushd, (Istiqāmah), 2:35.

is not in accordance with it.

Differences of opinion did develop among the fuqahā' on this precept. Ash-Shāfi^{c}ī, for example, followed the obvious meaning of ^{c}Ā'ishah's statement and held that prohibition in marriage by riḍā^{c}ah became effective by five nursings and not less. Others held that one or two nursings were not sufficient to prohibit marriage by riḍā^{c}ah but three were; their argument was based on another isolated ḥadīth according to which the Prophet said that there is no harm in one or two nursings. A third opinion held that there was no prohibition by riḍā^{c}ah until after ten nursings. According to the information in Ibn Rushd and az-Zurqānī, however, none of these differences of opinion goes back prior to ash-Shāfi^{c}ī.[1]

Commentators seem to be in general agreement that what ^{c}Ā'ishah is indicating by her report is that the Qur'ānic verse she is referring to had been completely abrogated during the last part of the Prophet's lifetime, such that it was not to be included in the recitation, but that knowledge of this abrogation did not reach some of the Prophet's Companions until after his death.[2] Al-Bājī and az-Zurqānī hold that, in any case, the verse ^{c}Ā'ishah is referring to could not

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[1]Ibn Rushd, (Istiqāmah), 2:35-36; az-Zurqānī, 4:184.

[2]Az-Zurqānī, 4:184-185; al-Bājī, 4:156-157; and Yaḥyā ibn Sharaf AN-NAWAWI, Sharḥ Muslim bi-Sharḥ an-Nawawī, ed. ^{c}Abd-Allāh 'Aḥmad 'Abū Zīnah, 5 vols. (Cairo: Dār ash-Sha^{c}b, n.d.), 3:631-632.

be regarded to be a legitimate part of the Qur'ān, since Qur'ānic verses by definition have to have been established by mutawātir [abundant] transmission, whereas this report is an isolated transmission.[1]

According to Ibn Rushd and Mālik's commentators, Mālik's position is based on the generality [ᶜumūm] of the pertinent Qur'ānic verse, which states simply that marriage is prohibited by riḍāᶜah without specifying what amount of nursings constitutes riḍāᶜah.[2] Thus, Mālik and those of his opinion hold that this prohibition goes into effect with a single nursing, since a single nursing is the minimum amount for which the word riḍāᶜah can be used. According to Ibn Rushd and 'Abū Zahrah, Mālik's rejection of the obvious [ẓāhir] meaning of ᶜĀ'ishah's report is an example of his granting priority to the generality [ᶜumūm] of the Qur'ānic text over the contrary implications of isolated ḥadīth which are not supported by the ᶜamal of Madīnah.[3]

Al-Bājī holds, however, that ᶜĀ'ishah's report is not really contradictory to Madīnan ᶜamal; he holds, rather, that it is only the obvious [ẓāhir] implication of her report which is contradictory. The implication generally drawn from ᶜĀ'ishah's statement, as mentioned earlier, is that the verse speaking

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[1]Al-Bājī, 4:156; az-Zurqānī, 4:184-185.

[2]Qur'ān, 4:23.

[3]Ibn Rushd, (Istiqāmah), 2:35; 'Abū Zahrah, Mālik, p. 301. See above, pp. 147-148.

of the five nursings was also abrogated from the recitation of the Qur'ān but that knowledge of its abrogation did not reach some of the Companions until after the Prophet's death. Thus, ᶜĀ'ishah's report may be interpreted to mean that the ruling that prohibition by riḍāᶜah does not become effective until after the fifth nursing was also abrogated, for it is unlikely that recitation of the verse would have been abrogated without the ruling also having been abrogated.[1] (In fact, the Shāfiᶜī position is said to be that recitation of the verse was abrogated but the ruling contained in the verse was not.[2])

Al-Bājī holds that Mālik uses the expression that ᶜamal is not in accordance with ᶜĀ'ishah's report not because he or other Madīnan fuqahā' regarded her report to be contradictory to ᶜamal but because most people are incapable of understanding interpretations of reports that are contrary to their obvious [ẓāhir] meanings. Many people, al-Bājī holds, are not capable of understanding how a report can have a valid interpretation contrary to its obvious [ẓāhir] meaning even if such interpretations are repeated to them over and over again. Indeed, such persons often become only more confused by such interpretations. (Al-Bājī adds that the problem of not being able to understand anything but the ẓāhir meaning of texts had become especially great in his

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[1]See al-Bājī, 4:156. [2]An-Nawawī, 3:631.

own times.) Thus, according to al-Bājī, Mālik uses the expression Al-x̄ as a means of dispensing with the problem of having to rely upon the capability of people to understand an interpretation of the text which is not obvious.[1] One could apply this same opinion of al-Bājī to the preceding example, in which the statement of ᶜUmar ibn al-Khaṭṭāb--as some Mālikī fuqahā' have observed--can be interpreted in such a manner as not to be contrary to Madīnan ᶜamal.[2]

Again, it is difficult to determine the source of the Madīnan ᶜamal that Mālik has in mind except with reference to textual evidence--such as the Qur'ānic verse on riḍāᶜah--which he does not cite. Presumably, the type of ᶜamal he has in mind in this example would be of the category of ᶜamal naqlī, going back to the revelation or abrogation of the relevant Qur'ānic verses.

4. Transactions of Buying and Selling and Baiᶜ al-Khiyār[3]

> Mālik cites a ḥadīth according to which the Prophet said that the buyer and seller [al-mutabāyiᶜān] have the option to choose [al-khiyār] [whether or not they want to conclude or forgo a transaction between themselves] as long as they have not parted company ["mā lam yatafarraqā"], except in the case of baiᶜ al-khiyār. After this ḥadīth Mālik states that there is no well-

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[1]Al-Bājī, 4:156-157. [2]See above, p. 635.

[3]Baiᶜ al-Khiyār: A special type of sales transaction whereby the purchaser is given a stipulated period of time to make his choice [khiyār] as to whether or not he desires to keep the item purchased or return it to the seller. As mentioned above, there were differences of opinion among the fuqahā' regarding the definition and legitimacy of baiᶜ al-khiyār.

known limit for this among us nor is there any 'amr [custom; precept] in it that has been put into practice.[1]

ᶜIyāḍ states that Mālik's position on this ḥadīth constitutes one of the sharpest points of contention between Mālikīs and some non-Mālikīs. For Mālik transmits the above ḥadīth with what is regarded to be the soundest Madīnan 'isnād--Mālik from Nāfiᶜ from ᶜAbd-Allāh ibn ᶜUmar--and yet, according to these opponents, Mālik rejects this ḥadīth in favor of the ᶜamal of the people of Madīnah.[2]

There are essentially two points of law in this ḥadīth, and each of them constituted a point of difference between the fuqahā', Madīnan and non-Madīnan alike. The first point of law is the definition of what constitutes a binding sales agreement. Is such an agreement constituted merely by the verbal or written contract [ᶜaqd] between a buyer and seller that they agree to make such a transaction,

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[1]Muwaṭṭa', 2:671. The expression Mālik uses is: "Wa laisa li-hādhā ᶜindanā ḥadd maᶜrūf wa lā 'amr maᶜmūl bihī fīhi."

[2]ᶜIyāḍ, 1:72. Al-Qarāfī also discusses briefly the contentions that developed around this ḥadīth. After stating that Mālik regards the ᶜamal of the people of Madīnah to be a stronger argument than this isolated ḥadīth, al-Qarāfī adds that it is fitting to discuss in this context ash-Shāfiᶜī's statement, "If a ḥadīth is authentic, then it is my madhhab," or his statement, "If a ḥadīth is authentic, then take my madhhab and dash it against the wall." Al-Qarāfī states that, if by this, ash-Shāfiᶜī means that he will follow the implications of authentic ḥadīth whenever there are no other legal arguments that contradict those implications, then he is no different from any other of the fuqahā' in that regard. But, if by these statements, he means that he will always follow the implications of a ḥadīth despite the

or is such an agreement made binding only after the buyer and seller have parted company after their having made an agreement? The second point of law in this ḥadīth is what is meant by baiᶜ al-khiyār, whether or not such a type of transaction is permissible at all and, if so, for how long?

There have also been some disagreements among Mālikīs about which of these two points of law Mālik's comment at the end of the ḥadīth is addressed to. Most of them held that it was addressed to the second point and that Mālik meant by this comment that there was no well-known limit or established custom regarding the length of the period during which the purchaser of an item has the option of choice [khiyār] when purchasing according to the contract of baiᶜ al-khiyār.[1] Some others, however, understood Mālik's comment as indicating his rejection of the first part of the ḥadīth, namely, that any limit constituted by the buyer and seller parting company has not been accepted among the Madīnans and that there is no ᶜamal consistent with that part of the ḥadīth.[2]

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presence of strong, contrary legal arguments to those implications, then--al-Qarāfī states--ash-Shāfiᶜī has gone against the consensus of the other fuqahā'. Al-Qarāfī, 1:146.

[1]See ᶜIyāḍ, 1:72; Ibn Rushd, (Istiqāmah), 2:207-208; al-Bājī, 5:55-57; az-Zurqānī, 4:282-284.

[2]Cf. ᶜIyāḍ, 1:72; he objects to this interpretation. Ash-Shāṭibī follows this interpretation, however, and cites Mālik's comment regarding this ḥadīth as one of several examples of Mālik's rejecting ḥadīth of conjectural meanings or questionable implications when they are contrary to well-es-

In so far as the first point of law is concerned, Mālik's position is that transactions of buying and selling become immediately binding once an agreement is made--except in the case of bai^c al-khiyār--and that it makes no difference whether the buyer and seller part company after that agreement or not. Mālik's position is said to be based on the precept of Islamic law that contracts and covenants are binding, which is supported by several verses of the Qur'ān.[1] This is also said to have been the opinion of Rabī^cah, 'Ibrāhīm an-Nakha^cī, 'Abū Ḥanīfah, 'Abū Yūsuf, ash-Shaibānī, Sufyān ath-Thawrī, and others. The Madīnans ^cAbd-Allāh ibn ^cUmar--the transmitter of the ḥadīth--and Sa^cīd ibn al-Musayyab are said to have disagreed as did al-Ḥasan al-Baṣrī, al-'Awzā^cī, and al-Laith ibn Sa^cd. They held that agreements of buying and selling were not binding until the buyer and seller had parted company or, according to al-Laith, until one of them got up to leave.[2] Their contrary opinions are

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tablished precepts or principles of Islamic law. See ash-Shāṭibī, Al-Muwāfaqāt, 3:20-21.

[1]Ibn Rushd, (Istiqāmah), 2:207; az-Zurqānī, 4:282-284; al-Bājī, 5:55-56. For such verses, see Qur'ān, 5:1; 2:177; 3:72; cf. 5:89, 6:152; 16:91; 17:34; 33:15, 23; 13:20; 48:10.

It is also argued that an allowance of not making agreements of buying and selling binding until after the indefinite period of time before the buyer and seller part company could place either party in undue jeopardy [gharar], and it is a precept of Islamic law that such undue jeopardy is to be avoided. See Ibn Rushd, (Istiqāmah), 2:207; ash-Shāṭibī, Al-Muwāfaqāt, 3:21.

[2]See citations above in note 1.

in keeping with the ẓāhir [obvious] meaning of the ḥadīth.[1]

In so far as the second point of law is concerned, Mālik held that the length of the option periods in baiᶜ al-khiyār depended on the type of item purchased and the amount of time customarily required to determine the worth and defects of the item. Al-Bājī sets forth several recommended option periods that Mālik speaks of in the Mudawwanah, the "Wāḍiḥah", and the "Mawwāzīyah". For example, he recommended about a month for buying a house, so that one can check the walls and foundations, come to know the neighbors, and so forth. For items like clothing, however, Mālik felt that from one to two days should be sufficient.[2] Sufyān ath-Thawrī and some others, however, are said to have held that such option periods are permissible under no circumstances, since contracts of buying and selling become immediately binding.[3] 'Abū Ḥanīfah and some other Kūfans are said to have held that such option periods must never exceed three days--which was the position that ash-Shāfiᶜī took. 'Abū Ḥanīfah's reasoning

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[1]I say "the ẓāhir meaning" because some fuqahā'--'Abū Bakr ibn al-ᶜArabī, ᶜIyāḍ, etc.--have argued that the verb, "tafarraqa" need not mean "to part company", although that is a common meaning. They cite instances in the Qur'ān--e.g., 98:4; cf. 3:105, 42:14, 3:103; 42:13, etc.--when it is used to refer to holding different opinions. They conclude by what appears to be a far-fetched interpretation that the ḥadīth means that the buyer and seller have the option to choose as long as an agreement has not been reached, except in the case of baiᶜ al-khiyār. 'Abū Ḥanīfah is also reported to have said that the ẓāhir of this ḥadīth is misleading. See ᶜIyāḍ, 1:72; al-Bājī, 5:55; az-Zurqānī, 4:283.

[2]Al-Bājī, 5:56; Ibn Rushd, (Istiqāmah), 2:207.

[3]Ibn Rushd, (Istiqāmah), 2:207.

is said to have been that the basic precept of Islamic law is that all contracts are binding. Therefore, an exception to this general precept may not be extended beyond the limits stipulated by textual authority. According to one ḥadīth--generally regarded to be authentic--the Prophet told a certain Companion--Ḥabbān ibn Munqidh[1]--that he could have an option period of three days on items that he purchased. Thus, 'Abū Ḥanīfah limits the option period to three days.[2] (Drawing exceptions to general precepts of law in this manner on the basis of isolated ḥadīth is what later Ḥanafī legal theorists referred to as "istiḥsān as-sunnah".[3])

'Abū Yūsuf and ash-Shaibānī, however, are reported to have disagreed with 'Abū Ḥanīfah on this matter. They held that there are no stipulated option periods at all in baiᶜ al-khiyār and that any period is valid upon which the buyer and seller agree.[4]

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[1]ḤABBĀN IBN MUNQIDH ibn ᶜAmr ibn ᶜAṭīyah al-Khazrajī was a man of very weak intelligence and poor judgment. He had suffered a serious head injury [ma'mūmah] earlier in his life and could only speak slowly and with difficulty. Some reports also have it that he was blind. When Ḥabbān complained to the Prophet that he was often taken in the market place, the Prophet gave him an option period of three days on whatever he purchased and told him to say, "Lā khilābah" [do not cheat (me)], before buying anything. It is reported that Ḥabbān, who could not pronounce these words, would be heard saying instead, "Lā khiyābah, lā khiyābah." 'Aḥmad ibn ᶜAlī IBN ḤAJAR, Al-'Iṣābah fī Tamyīz aṣ-Ṣaḥābah, with Al-Istīᶜāb fī Maᶜrifat al-'Aṣḥāb by Yūsuf IBN ᶜABD-AL-BARR, 4 vols. (Egypt: Maktabat as-Saᶜādah, 1328/[1910]; reprint ed., Baghdād: Maktabat al-Muthannā, [1970]), 1:303.

[2]Ibn Rushd, (Istiqāmah), 2:207; al-Bājī, 5:56; az-Zurqānī, 4:283.

[3]See above, pp. 255-257. [4]Ibn Rushd, (Istiqāmah), 2:207.

Mālik follows the ḥadīth on bai^c al-khiyār with another ḥadīth according to which the Prophet said that whenever a buyer and seller [bayyi^cain] disagree [over the terms of their agreement] while carrying on a transaction, it is the word of the seller which is to be followed, and, if they do not agree to that, then each returns to the other what he has taken from him.[1] According to az-Zurqānī, Ibn ^cAbd-al-Barr held that Mālik had placed this ḥadīth after the ḥadīth on bai^c al-khiyār as an indication that the ḥadīth on bai^c al-khiyār had been abrogated. The implication of this second ḥadīth, according to Ibn ^cAbd-al-Barr, is that the agreement of buying and selling has already been finalized prior to the buyer and seller parting company. The buyer has paid the price, and the seller has handed over the item he was trying to sell. They have then disagreed on the terms of their agreement, and either the word of the seller will be followed or the agreement will be broken, with each party returning to the other what it had taken.[2]

Ibn ^cAbd-al-Barr is reported to have said that Mālik remarked regarding the ḥadīth on bai^c al-khiyār that the precept in it had been put aside [turika] and had never been put into practice.[3] This statement of Mālik, if authentic, reminds one of the statement of Ibn al-Qāsim in the Mudawwanah

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[1]Muwaṭṭa', 2:671. [2]Az-Zurqānī, 4:284-285; ^cIyāḍ, 1:72.
[3]Cited by az-Zurqānī, 4:285.

referred to earlier where Ibn al-Qāsim speaks of those ḥadīth, the authenticity of which is not questioned, which have come down from the past but have not been accompanied by ᶜamal. Such ḥadīth are not to be put into practice after having been put aside by the first generations. Rather, only those ḥadīth are put into practice which have been accompanied by practice, and those ḥadīth are passed over which have been passed over in ᶜamal.[1] This position of Ibn al-Qāsim, which appears to be also Mālik's position in this example and in other instances where he uses the expression Al-x̄, seems to be what ash-Shāṭibī has in mind when he reasons that it is not legitimate to put ḥadīth into practice for which there was no ᶜamal among the first generations or to draw legal implications from the texts of ḥadīth and āthār which the first generations did not draw from them. For, according to ash-Shāṭibī, the first generations, who were addressed by the Prophet and his Companions, understood what the ᶜamal was which the texts of the sharīᶜah desired from them. Thus, if a text carries a legal implication which they would have been likely to have put into practice had they known of it, it is apparent that either that implication was abrogated or not actually intended, if there is nothing in the ᶜamal of the first generations that corresponds to it.[2]

In this example, however, the prominent Madīnan Com-

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[1]See above, pp. 180-181. [2]See above, pp. 509-514.

panion ᶜAbd-Allāh ibn ᶜUmar and the prominent Madīnan Successor Saᶜīd ibn al-Musayyab are said to have followed the obvious interpretation of the ḥadīth.[1] Al-Bukhārī transmits an 'athar, for example, according to which it is reported that whenever Ibn ᶜUmar wanted to buy an item very much, he would get up and part company with the seller so as to make the agreement binding.[2] The ᶜamal of Madīnah, however, as indicated by information in other Mālikī sources and, according to some interpretations, by Mālik's statement after citing the ḥadīth,[3] was contrary to both Ibn ᶜUmar and Saᶜīd ibn al-Musayyab in this matter. This would be, then, another instance of Madīnan ᶜamal not supported by Madīnan 'ijmāᶜ. The precept of this ᶜamal, furthermore, is of the nature of ᶜumūm al-balwā, since contracts of buying and selling are an inescapable part of daily life. It is the type of matter, therefore, that should have been widely known and should have constituted widespread ᶜamal. Furthermore, it is the type of ᶜamal which came directly under the jurisdiction of the Madīnan judiciary, which would have had the responsibility of settling disputes that arose over contracts of buying and selling. Finally, this example would seem to be an example of what ash-Shāṭibī describes as following the widespread

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[1]See above, p. 643. [2]See az-Zurqānī, 4:284.

[3]See ᶜIyāḍ, 1:72; al-Qarāfī, 1:146; Ibn Rushd, (Istiqāmah), 2:207-208; al-Bājī, 5:55-57; az-Zurqānī, 4:282-285; see above, p. 642.

ᶜamal of the many instead of the contrary ᶜamal of the few.[1]

5. AlN-x̄:[2] ᶜUmar and the Slaves Who Stole a Camel

> Mālik transmits an 'athar according to which the slaves of a man named Ḥāṭib stole a camel from a man of the tribe of Muzainah and slaughtered and ate it. The matter was brought to the attention of ᶜUmar ibn al-Khaṭṭāb, who first commanded that the hands of the slaves be cut off but then changed his mind, saying to Ḥāṭib, "I believe that you have been starving them . . . . By God, I am going to impose a fine upon you that will be hard for you to bear." ᶜUmar then asked the man from Muzainah how much his camel was worth, and the man replied that he used to be unwilling to sell it for four hundred pieces of silver. ᶜUmar then commands Ḥāṭib to pay the man of Muzainah eight hundred pieces of silver. Mālik adds after this 'athar that the ᶜamal among us is not in accordance with doubling the indemnity [for what is stolen] in this manner; rather, the 'amr of the people among us has been well-established that a person is only fined the price of the camel or [other] animal on the day he took it.[3]

I could find no evidence of differences of opinion among the early fuqahā' regarding Mālik's opinion in this example. In fact, Ibn ᶜAbd-al-Barr is reported to have said that the ᶜulamā' had reached consensus that the fine which a thief pays in compensation for what he stole should not exceed the value of that item. Furthermore, Ibn ᶜAbd-al-Barr claims that there was consensus among them that the value of the stolen item is not to be established on the basis of

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[1]See above, pp. 509-514.

[2]The expression is: "Wa laisa ᶜalā hādhā 'l-ᶜamal ᶜindanā fī . . . wa lākin maḍā 'amr an-nās ᶜindanā ᶜalā 'annahū . . . "

[3]Muwaṭṭa', 2:748.

the claim of the plaintiff alone.[1] (According to this 'athar, ᶜUmar ibn al-Khaṭṭāb asked the plaintiff what the value of his camel had been, and then ᶜUmar had doubled it.) In this example, therefore, Mālik is apparently using his terminological expression only to indicate that ᶜUmar's ruling regarding Ḥāṭib is contrary to ᶜamal, even though there seem to have been no disagreements on the matter in Mālik's time. Mālik's use of the expression Al-x̄ in this example, then, is similar to his use of that expression after the ḥadīth of ᶜĀ'ishah regarding riḍāᶜah, upon which there were apparently no disagreements in Mālik's time.[2]

This 'athar reports an individual legal ruling [qaḍīyat ᶜain], which--like reports of actions--are considered to be of conjectural import in Mālikī legal theory and as insufficient evidence in themselves that the ruling or action they report is obligatory or normative.[3] Although ash-Shāfiᶜī does not believe that ᶜUmar's judgment in this matter constitutes the rule which is to be followed, he accuses the Mālikīs of being arbitrary in their stating that ᶜUmar's action is contrary to ᶜamal. He asks them on what basis they can regard ᶜUmar ibn al-Khaṭṭāb's statements to be authoritative in other instances and not regard his legal ruling to be so in this case.[4]

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[1]Cited by az-Zurqānī, 4:438. [2]See above, p. 636.

[3]See above, pp. 188-195.

[4]Ash-Shāfiᶜī, "Ikhtilāf Mālik," p. 231; see above, pp. 353-356.

Mālik's use of the term Al-x̄ indicates that ᶜUmar's ruling in the case of Ḫāṭib was not normative but not necessarily that it was wrong. Al-Bājī states that Ḫāṭib ibn 'Abī Baltaᶜah was a man of great wealth, and ᶜUmar's ijtihād was that by requiring Ḫāṭib only to compensate for the loss of the camel, according to standard procedure, would neither be sufficient to punish Ḫāṭib, with his considerable wealth, or to keep him from starving his slaves in the future. (Al-Bājī also reports, however, that Ibn Wahb was of the opinion that ᶜUmar had doubled the fine in lieu of not having cut off the hands of the slaves; by doubling the fine, furthermore, he made Ḫāṭib carry the full punishment.) Furthermore, al-Bājī continues, ᶜUmar accepted the word of the plaintiff--the man from Muzainah--regarding the value of the camel, because it was not ᶜUmar's intention to impose a fine on Ḫāṭib for the value of the camel anyway but, rather, far in excess of the value of the camel, so that in his words he could impose a fine upon Ḫāṭib that would be difficult for him to bear.[1] The implication of al-Bājī's treatment of ᶜUmar's ruling in the case of Ḫāṭib is that it was suitable for the circumstances and, hence, would be suitable for similar circumstances in the future, but it was an unusual and not a normative ruling such that ᶜamal would be in accordance with it.

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[1]Al-Bājī, 6:64-65; cf. az-Zurqānī, 4:438.

Viewed in this manner, ᶜUmar's ruling in the case of Ḫāṭib--although not standard procedure (ᶜamal) for cases of theft--would have the same validity as other types of exceptional legal decisions in Mālikī fiqh like those made on the basis of the principles of istiḥsān and sadd adh-dharā'iᶜ, which draw exceptions to general rules or procedures because of special circumstances.[1]

ᶜAmal Chapters

1. Alx:[2] How One Wipes over the Shoes in Performing Masḥ

> Mālik cites an 'athar which reports that ᶜUrwah ibn az-Zubair used to wipe over his shoes when performing masḥ by wiping only over the top and not the bottom of the shoe. Mālik then cites another report according to which az-Zuhrī was asked how wiping over the shoes ought to be done; az-Zuhrī demonstrated by wiping over both the top and bottom of the shoe. Mālik states after az-Zuhrī's report that az-Zuhrī's position is the most preferable ['aḥabb] to him of that which he has heard in the matter.[3]

'Abū Ḥanīfah, Sufyān ath-Thawrī, al-Ḥasan al-Baṣrī, and others are said to have disagreed with Mālik regarding the preferability of wiping over both the top and bottom of the shoe when doing this procedure, which is referred to as "al-masḥ ᶜalā 'l-khuffain". They did not regard it as preferable to do as az-Zuhrī is reported to have done and held

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[1]See above, pp. 245-268.

[2]This symbol stands for the expression, "al-ᶜamal fī 'x'" [the ᶜamal regarding "x"] and is used for the twenty-nine chapters of the Muwaṭṭa' that are so-entitled.

[3]Muwaṭṭa', 1:38.

that the proper way to do mash was to wipe only over the top of the shoe, as ᶜUrwah is reported to have done.[1] Ash-Shaibānī contends against the Madīnans on this point and cites what he refers to as "the well-known 'athar of ᶜUmar ibn al-Khaṭṭāb" according to which he said: "If religion were done on the basis of ra'y, there would be more reason for wiping the bottom of the shoe than the top." Ash-Shaibānī interprets this statement as ᶜUmar's objection ['inkār] to wiping over the bottom of the shoe, and he accuses the Madīnans of having departed from it and from the practice of ᶜUrwah ibn al-Zubair, whom he regards as having had greater knowledge of the sunnah and greater knowledge and understanding of knowledge transmitted from the past [ar-riwāyah] than Ibn Shihāb. Furthermore, ash-Shaibānī contends, the Madīnans have transmitted no āthār supporting az-Zuhrī's opinion.[2]

Mālik, however, apparently regarded both procedures to be valid, i.e., that of ᶜUrwah ibn az-Zubair and that of az-Zuhrī, for he includes them both in this Alx chapter. Mālik indicates by his statement of preference not that he regards ᶜUrwah's action to be mistaken but that he regards az-Zuhrī's to be preferable. According to al-Bājī, Saḥnūn and Ibn Ḥabīb, the compiler of the "Wāḍiḥah",[3] have trans-

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[1]See Ibn Rushd, 1:111 (18); ash-Shaibānī, Ḥujjah, 1:35.

[2]Ash-Shaibānī, Ḥujjah, 1:35.

[3]See above, p. 97, n. 3, and p. 117.

mitted reports from Mālik that he regarded it obligatory that one wipe the top of the shoe when performing mash, and, whereas he did not regard it to be obligatory that one also wipe the bottom of the shoe, Mālik regarded that, nevertheless, to be preferable.[1] Az-Zuhrī's manner of performing mash, therefore, does not constitute rejection of ᶜUrwah's manner of doing it; rather, it includes ᶜUrwah's way of performing mash, while adding something additional to it. It might be pointed out, furthermore, that the statement attributed to ᶜUmar ibn al-Khaṭṭāb does not necessarily imply his having objected to one's wiping the bottom of the shoe. It simply supports the position that it is obligatory to wipe the top of the shoe and not the bottom, even though one would think that there is greater reason to wipe the bottom than the top.

Madīnan ᶜamal regarding mash would appear to be of the category of what I have referred to as "mixed ᶜamal". In other words, there would have been two types of ᶜamal in Madīnah on this matter; some Madīnans would have performed mash according to the manner of ᶜUrwah, while others would have performed it according to the manner exemplified by az-Zuhrī. It should be noted, furthermore, that ᶜamal regarding mash does not come under the jurisdiction of the Madīnan judiciary. As I have suggested, it was probably

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[1]Al-Bājī, 1:81.

the authority of the Madīnan judiciary which established uniform Madīnan ᶜamal in matters of law which came under its jurisdiction but regarding which there had been significant differences of opinion among the Madīnan people of knowledge.[1]

ᶜAmal regarding masḥ pertains to a ritual of worship [ᶜibādah], and the majority of Alx chapters pertain to such matters. Mālik precedes the chapter by a chapter containing several ḥadīth and āthār about masḥ. These reports indicate that the Prophet and his Companions performed masḥ, and they indicate such details as the requirement that one's feet be ritually clean [ṭāhir] by way of having wuḍū' before one puts on one's shoes before it is permissible to perform masḥ over the shoes. They do not, however, indicate how masḥ is to be performed, which is indicated only in the Alx chapter. ᶜAmal regarding masḥ, therefore, would be of the category of ᶜamal naqlī. It pertains to ᶜumūm al-balwā and would have been done repeatedly over the generations by a large number of people. It is noteworthy, however, that Mālik regards the examples of ᶜUrwah ibn az-Zubair and az-Zuhrī--prominent Madīnan Successors and persons of knowledge--as valid indications of this ᶜamal. They provide the precept of how masḥ is to be performed from their personal knowledge and experience with the Madīnan tradition. Thus, this is another example of how Madīnan ᶜamal naqlī provides information for which Mālik

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[1]See below, pp. 756-759, and above, pp. 429-431.

does not cite any early supporting legal texts, i.e., ḥadīth or āthār of Companions. Indeed, ash-Shaibānī's critique of Mālik's preferring az-Zuhrī's manner of performing masḥ is that there are ḥadīth and āthār which corroborate ᶜUrwah's manner of performing it, while ash-Shaibānī contends that there are none supporting az-Zuhrī's example.[1]

2. Alx: How One Is Supposed to Sit While Performing Ṣalāh:

The chapter contains five reports and no additional comments from Mālik. The first four reports pertain directly to things ᶜAbd-Allāh ibn ᶜUmar said and did about this ᶜamal. A man reports in the first of these that Ibn ᶜUmar once saw him playing with the pebbles on the ground while sitting in his prayer. Afterward Ibn ᶜUmar prohibited him from doing that and enjoined upon him to sit in his prayer as the Prophet had done. The man asked Ibn ᶜUmar how that had been, and so he explained to him. According to the second report, a man once sat next to Ibn ᶜUmar during prayer and crossed his legs under himself while sitting in prayer in an uncustomary fashion. Afterward Ibn ᶜUmar reprimanded this person for praying in that manner; the man rejoined by saying that he had noticed that Ibn ᶜUmar prayed that way himself. Ibn ᶜUmar explains that he does so only because of the pain in his legs. In the third report, a man notices Ibn ᶜUmar sitting in prayer in this uncustomary fashion and asks him afterward about it. Ibn ᶜUmar replies: "It is not the sunnah of ṣalāh; I do it only because of the pain which I feel." Similarly, in the fourth report a boy imitates Ibn ᶜUmar's manner of sitting in his prayer, but Ibn ᶜUmar prohibits him from doing so and tells him what the sunnah of ṣalāh is. The boy asks Ibn ᶜUmar why he prays in the manner he does, and Ibn ᶜUmar responds by saying that his foot is not strong enough to support him. The fifth report relates how al-Qāsim ibn Muḥammad taught the people to sit while performing ṣalāh. Al-Qāsim states that Ibn ᶜUmar had taught it to him and told him that it was the manner in which his father, ᶜUmar ibn al-Khaṭṭāb, used to sit while praying.[2]

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[1]Ash-Shaibānī, Ḥujjah, 1:35. [2]Muwaṭṭa', 1:88-90.

The ᶜamal in the first four reports is a matter of general agreement among the Madīnans and non-Madīnans. It pertains to how one places one's hands on the lap while performing ṣalāh and specifies that one sit with one's weight on the ball of the right foot, which is kept erect. The top of the left foot, on the other hand, is placed against the ground and the foot is turned inward underneath the body.[1] The fifth report, however, contains a point of difference between 'Abū Ḥanīfah and the Madīnans, for al-Qāsim states in it that one should sit on the left hip and not the left foot during the middle and at the end of the prayer [i.e., during at-tashahhud]. 'Abū Ḥanīfah held, on the other hand, that one sits on the left foot throughout the prayer.[2]

The type of ᶜamal treated in this chapter pertains again to acts of ritual and worship. It would be of the category of ᶜamal naqlī, as is indicated by the content of the reports Mālik cites. In the first report, Ibn ᶜUmar enjoins the man to pray after the manner of the Prophet. In the third and fourth Ibn ᶜUmar speaks of the sunnah of ṣalāh, which he is unable to perform because of the pain and weakness in his leg. (Al-Bājī reports that Ibn ᶜUmar's feet had been seriously wounded in the Battle of Khaibar and never healed completely.[3]) Mālik adds no additional

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[1]Ibn ᶜAbd-al-Barr is reported to have said that this was a matter of consensus among the fuqahā'; cited by az-Zurqānī, 1:273.

[2]Al-Bājī, 1:166. [3]Ibid., 1:165.

information to what is contained in the reports he cites, other than to indicate by the title of the chapter that the actions and statements reported are in accordance with Madīnan ᶜamal. It might also be pointed out that the fifth report shows continuity between the ᶜamal of al-Qāsim ibn Muḥammad and the Companions ᶜAbd-Allāh ibn ᶜUmar and his father, ᶜUmar ibn al-Khaṭṭāb.

Another significant part of the reports of this chapter is the picture they give of ᶜAbd-Allāh ibn ᶜUmar--one of the most prominent Madīnan ᶜulamā'--as a guardian of ᶜamal, as it were. As al-Bājī points out, the second, third, and fourth reports indicate how persons of the calibre of Ibn ᶜUmar were regarded by the people as worthy of imitation [al-iqtidā'].[1] Ibn ᶜUmar indicates to the three persons in these reports, however, that his manner of sitting in the prayer is not normative, is not the sunnah of ṣalāh, and should not be imitated by persons who are capable of doing the sunnah of ṣalāh. Ibn ᶜUmar's example in these reports is an illustration of ash-Shāṭibī's concept of the ideal role of the ᶜulamā' in fostering and preserving the content of sound, normative ᶜamal.[2]

3. Alx: S-XN: ᶜAmal
Regarding ᶜId Prayers:

Mālik states that he has heard it transmitted from several of their ᶜulamā' that there has been no call to

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[1]Al-Bājī, 1:165. [2]See above, pp. 403-409, 448-453.

prayer [nidā'] or 'iqāmah[1] in either of the two ᶜīd[2] prayers since the time of the Messenger of God until the present day. Mālik then says that this is the S-XN. Finally, Mālik adds a report according to which ᶜAbd-Allāh ibn ᶜUmar used to bathe himself before going out to pray the ᶜīd prayers.[3]

Al-Bājī states that he knows of no differences of opinion among the fuqahā' regarding the precept that there is no call to prayer or 'iqāmah in the ᶜīd prayers.[4] Nevertheless, there are reports that some of the 'Umayyad heads of state and their governors sought to institute the call to prayer in ᶜīd prayers. Az-Zurqānī cites reports that Muᶜāwiyah, Marwān ibn al-Ḥakam, Ziyād ibn 'Abīhi, and al-Ḥajjāj ibn Yūsuf attempted to do this.[5] Al-Bājī states that, according to Ibn Ḥabīb in the "Wāḍiḥah", the 'Umayyad ruler Hishām was the first to attempt to do it.[6] Thus, Mālik's use of the term S-XN in this example would appear not to be used in reference to differences of opinion among the fuqahā' but rather in reference to any who would attempt to follow the examples of these 'Umayyad rulers and governors.

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[1] 'Iqāmah: A second call to prayer which follows the first but is addressed to the congregation which is present, directing them to stand and prepare to make the ṣalāh.

[2] ᶜīd Prayers: Two large community prayers held twice annually at the beginning of the two ᶜīd festivals. The first ᶜīd takes place the day after the end of Ramaḍān, the month of fasting. The second ᶜīd takes place upon conclusion of the annual pilgrimage to Makkah.

[3] Muwaṭṭa', 1:177. [4] Al-Bājī, 1:315. [5] Az-Zurqānī, 2:112-113.

[6] Al-Bājī, 1:315.

There were apparently no differences of opinion among the fuqahā' regarding the desirability of bathing oneself before ᶜīd prayers, as ᶜAbd-Allāh ibn ᶜUmar is reported to have done. Ash-Shaibānī states in his commentary on this 'athar that 'Abū Ḥanīfah regarded it as a good thing [ḥasan], although he did not regard it to be obligatory [wājib].[1] Al-Bājī quotes reports from early Mālikī compendia stating that he also did not regard bathing oneself prior to ᶜīd prayers as something obligatory, although he regarded it to be desirable.[2] Mālik gives no indication in the Muwaṭṭa' of whether or not he regarded this matter to be obligatory or desirable; he indicates by placing Ibn ᶜUmar's 'athar in this ᶜAmal Chapter, however, that he held that it should be a part of ᶜamal.

The S-XN precept about there being no call to prayer or 'iqāmah in ᶜīd prayers is one of the most explicit indications of ᶜamal naqlī in the Muwaṭṭa'. Mālik states that this is a matter which has been part of the continuous ᶜamal of Madīnah from the time of the Prophet until the present. Mālik does not support this precept by reference to ḥadīth or similar legal texts but by reference to the well-established ᶜamal of Madīnah in the matter over the generations. It might also be observed that this sunnah precept is contrary to analogy with related precepts pertaining to the

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[1]Shaibānī, Muwaṭṭa', p. 48. [2]Al-Bājī, 1:315-316.

five daily prayers. For the call to prayer and the 'iqāmah are fundamental parts of those types of ṣalāh. It would appear that those 'Umayyads who are reported to have sought to institute the call to prayer and the 'iqāmah in the ᶜīd prayers did so on the basis of that analogy. Therefore, in this example again Mālik uses a sunnah term for a matter which is contrary to analogy with related precepts of law.[1]

Finally, the report about ᶜAbd-Allāh ibn ᶜUmar is a report of an action, and there is nothing implicit in the text to indicate that it should be normative for others. For example, it could be like numerous other things that Ibn ᶜUmar is reported to have done that were unique parts of his behavior, such as sprinkling water in his eyes when he bathed himself.[2] Therefore, by placing this 'athar in an ᶜamal chapter, Mālik indicates that Ibn ᶜUmar's act reflects a desired norm. Thus, I believe this is another instance of Mālik's making reference to ᶜamal to distinguish normative from non-normative behavior.[3]

4. Al-x: How Sacrificial Camels Are to Be Driven to Pilgrimage:

Mālik cites seven āthār which tell of how ᶜAbd-Allāh ibn ᶜUmar used to prepare sacrificial camels which he would drive to Makkah to be sacrificed at the conclusion of the pilgrimage. The reports contain some statements he made about these animals, such as, for example, what

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[1]See above, pp. 576-582.

[2]See Muwaṭṭa', 1:44-45; ash-Shaibānī quotes Mālik as having said that Ibn ᶜUmar's putting water in his eyes while bathing is not ᶜamal; ash-Shaibānī, Muwaṭṭa', p. 45.

the minimum age of such animals should be. The reports tell how he would decorate these camels, where he would take them, how he would sacrifice them, and what he would say when doing so. They report how he would decorate the Ka^{c}bah with the expensive cloth he had decorated these animals with, or how in other instances he would give that cloth as charity to the poor. They report how he would eat some of the meat from the camels himself and give the remainder to the poor. Mālik concludes the chapter with a report according to which ^{c}Urwah ibn az-Zubair enjoined his children never to take such an animal as a sacrificial animal in pilgrimage which they would be ashamed of giving as a gift to one who had been very generous to them. He explains that God is the most generous of all beings and that, therefore, it is most fitting that excellent animals be sacrificed for His sake during the pilgrimage.[1]

There was general agreement among the fuqahā' on most of the ^{c}amal set forth in this chapter, with disagreements on only one point, as far as I know. Mālik reports that Ibn ^{c}Umar would mark his sacrificial camels by inflicting a cut in the left side of their humps. (This wounding is called "'ish^{c}ār" [marking]). 'Abū Ḥanīfah is reported to have objected to the practice of 'ish^{c}ār, because he regarded it as an instance of mutilation and reasoned that the Prophet had forbidden the mutilation of animals. It is also reported that 'Ibrāhīm an-Nakha^{c}ī held this opinion.[2] Other fuqahā' argued, however, that 'ish^{c}ār was part of the sunnah of the Prophet which he had done during the last year of his life, as reported in various ḥadīth. They argued, furthermore, that 'ish^{c}ār, like branding, is supposed to be done in such a manner as not to injure the animal's health. The

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[1]Muwaṭṭa', 1:379-380. [2]Az-Zurqānī, 3:158-159; al-Bājī, 2:312.

purpose of 'ish^{c}ār, these fuqahā' are said to have reasoned, was that it enabled the poor to identify which animals were bound for sacrifice so that they could follow those animals and be present at the sacrifice in order to receive a share of the animal's meat. They added that by doing 'ish^{c}ār sacrificial animals could be identified if they broke away or got lost; poor people who found them would be able to sacrifice and eat them.[1] It is reported that 'Abū Yūsuf and ash-Shaibānī disagreed with 'Abū Ḥanīfah regarding 'ish^{c}ār, but, although they regarded it to be part of the sunnah, they held, in contrast to Mālik's ^{c}amal, that 'ish^{c}ār was to be done on the right and not the left side of the camel's hump and supported their position by reports to that effect.[2]

This ^{c}amal chapter pertains again characteristically to a ritual of worship. Mālik surely would have regarded it to be of the category of ^{c}amal naqlī, even though he cites no ḥadīth from the Prophet. Az-Zurqānī points out that several of Ibn ^{c}Umar's actions in this chapter are supported by Qur'ānic verses.[3] Az-Zurqānī and al-Bājī also cite several ḥadīth of well-established authenticity supporting the ^{c}amal of this chapter.[4]

Mālik's almost exclusive reliance in this chapter upon

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[1]Az-Zurqānī, 3:159. [2]Ibid., 3:158.

[3]Ibid.; see Qur'ān, 2:196; 22:36, 28.

[4]Az-Zurqānī, 3:158-160; al-Bājī, 2:312-315.

the statements and actions of Ibn ᶜUmar is, I believe, another illustration of his reliance upon prominent Companions to verify the content of Prophetic sunnah.[1] Material cited elsewhere in the Muwaṭṭa'--such as, for example, the āthār in the ᶜamal chapter on how to sit while performing ṣalāh--indicate Ibn ᶜUmar's concern that the sunnah of the Prophet be followed. In that example, Ibn ᶜUmar is himself unable to practice the Prophet's sunnah because of a physical disability, and he enjoins different persons not to follow his example in that case but to follow the sunnah of ṣalāh instead.[2] Mālik's heavy reliance upon Ibn ᶜUmar in this and other examples indicates his high estimation of Ibn ᶜUmar as a close adherent to the sunnah. Mālik must have regarded him to be of the same category in that regard as his father, ᶜUmar ibn al-Khaṭṭāb, and the other early caliphs, whom Mālik alludes to in his letter to al-Laith ibn Saᶜd and whom he describes as having followed the Prophet more closely than anyone else in his community ['ummah]. Mālik states in that letter how these prominent Companions would follow what they had learned from the Prophet, how they would inquire of other Companions about that of which they had no knowledge, and how they would perform ijtihād in other matters on the basis of their knowledge and their recent experience with the Prophet.[3]

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[1]See above, pp. 161-170. [2]See above, pp. 656-658.

[3]See above, pp. 316-317.

It is unlikely, however, that Mālik would have regarded these several āthār of Ibn ᶜUmar's actions to be an indication of ᶜamal if they did not correspond to Madīnan ᶜamal. Although Mālik adds no additional details to the precepts as set forth in these āthār, he indicates by placing them in an ᶜamal chapter that he regards them to reflect a desired norm. There are, of course, other instances where Mālik regards actions of Ibn ᶜUmar, other prominent Companions, or even the Prophet not to reflect normative behavior, and this appears to be another illustration of how ᶜamal is used to differentiate between reports of normative and non-normative behavior.[1] One is reminded in this regard of the quotation of Ibn al-Qāsim in the Mudawwanah in which he makes the Mālikī principle clear that legal texts are not regarded as having any value in practice unless they have been accompanied by ᶜamal.[2] For Mālik it is the non-textual source of Madīnan ᶜamal which is the primary referent in evaluating, interpreting, or setting aside the textual sources of law.

5. Alx: Washing the Bodies of Martyrs before Their Burial

> Mālik cites an 'athar which states that ᶜUmar ibn al-Khaṭṭāb's body was washed, shrouded, prayed upon, and then buried and that he died a martyr [shahīd]. Mālik states after this 'athar that it is the sunnah that martyrs who die on the battlefield before their bodies can be rescued are buried in the clothing in which they died; their bodies are not washed, and fun-

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[1]See above, 465-474.

[2]See above, pp. 180-181.

> eral prayers are not said for them. Mālik states that he has heard report of this from the people of knowledge, and he adds that the bodies of martyrs who live for whatever time God wills after the battle are washed, shrouded, and prayed over, as was the *ᶜamal* in the case of ᶜUmar ibn al-Khaṭṭāb.[1]

Saᶜīd ibn al-Musayyab and al-Ḥasan al-Baṣrī are reported to have disagreed with this precept. They held that the bodies of all martyrs, whether they die on or off the battlefield, are to be washed, shrouded, prayed over, and buried like anyone else. 'Abū Ḥanīfah held, like Mālik, that the bodies of martyrs who died on the battlefield were not to be washed or shrouded; he held, however, that funeral prayers should be conducted for all martyrs.[2] According to al-Bājī there was consensus among the *fuqahā'* regarding the correctness of the procedure which was followed in the case of ᶜUmar ibn al-Khaṭṭāb, who remained alive for a considerable time after receiving the stab wound from which he died and who had not been wounded in battle.[3]

Mālik's use of the *sunnah* term is noteworthy. It is used for a matter regarding which there had been significant differences of opinion, even from the prominent Madīnan *faqīh* Saᶜīd ibn al-Musayyab. Mālik gives no indication of there being local consensus behind this *sunnah* precept; he states simply that it is the *sunnah* but not that it is the S-XN, for example. It is a *sunnah* precept, nevertheless,

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[1] *Muwaṭṭa'*, 2:463. [2] Al-Bājī, 3:210; Ibn Rushd, 1:133 (15).

[3] Al-Bājī, 3:210.

that was also a part of ᶜamal, as indicated by its being included in an ᶜamal chapter. Thus, this would appear to be another example of a type of Madīnan ᶜamal for which there was no local consensus among the people of knowledge in Madīnah. The burial of martyrs on the battlefield, one would assume, would come under the authority of the 'amīr [commander] or some other executive authority. It might also be noted that this sunnah precept is contrary to analogy with related precepts of law, which--as pointed out earlier--appears to be a common characteristic of Mālik's sunnah terms.[1] The bodies of martyrs who die on the battlefield are not, according to Mālik, to be buried in a manner analogous to people who die under other circumstances.

The content of this ᶜamal chapter pertains again to rituals that are connected to worship. Similarly, the precepts in this chapter would appear to be of the category of ᶜamal naqlī. Al-Bājī states that the sunnah precept is in keeping with a ḥadīth, regarded to be authentic, according to which the Prophet did not wash, shroud, or pray over the bodies of the martyrs who were killed at the battle of 'Uḥud.[2] Mālik, however, cites no supporting legal texts but provides the precept instead from a summary of what he has heard from the people of knowledge, which is supported by ᶜamal in turn, and he explains the reason for the difference

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[1]See above, pp. 576-582. [2]Al-Bājī, 3:210.

between the sunnah precept and the procedure which was followed in the case of ᶜUmar ibn al-Khaṭṭāb.

6. Alx: Sacrificing a Sheep Upon the Birth of a Child

Mālik begins the chapter by citing four reports and ends by elaborating the precept of ᶜaqīqah, i.e., the rite of sacrificing a sheep upon the birth of a child. The first 'athar reports that ᶜAbd-Allāh ibn ᶜUmar would always provide a sheep for ᶜaqīqah to any member of his family who asked for it; he would sacrifice one sheep for each newly born child, whether it was a boy or a girl. The second report states that 'Ibrāhīm ibn al-Ḥārith[1] used to say that it was preferable that ᶜaqīqah be done, even if with only a small bird. The third report relates that ᶜaqīqah was performed in the case of Ḥasan and Ḥusain, the sons of ᶜAlī ibn 'Abī Ṭālib. The fourth reports that ᶜUrwah ibn az-Zubair used to perform ᶜaqīqah for each of his children and that he would sacrifice one sheep for each boy or girl. Mālik then states the AN regarding ᶜaqīqah. One sheep is sacrificed in ᶜaqīqah for either a boy or a girl. ᶜAqīqah is not obligatory [wājibah], but the ᶜamal of doing it is desirable [yustaḥabbu], and it is one of the customs ['amr] which the people among us have always held to.[2] Mālik continues to say that ᶜaqīqah is analogous to [bi-manzilat] other types of ritual sacrifice; hence, animals that are one-eyed, emaciated, or sick or which have broken bones are not acceptable. Neither the meat or hide of the ᶜaqīqah are to be sold. The bones of the ᶜaqīqah may be broken [when it is being cut up after slaughter]. The family performing the ᶜaqīqah eats part of the meat and gives part of it as charity. None of the blood from the ᶜaqīqah is to be smeared on the head of the child.[3]

Al-Laith ibn Saᶜd and Mālik's teacher 'Abū 'z-Zinād

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[1] IBRĀHĪM IBN AL-ḤĀRITH ibn Khālid at-Taimī al-Qurashī was the father of Muḥammad ibn 'Ibrāhīm ibn al-Ḥārith, who transmitted this 'athar to Rabīᶜah. 'Ibrāhīm made hijrah to Madīnah with his father, who had migrated to Ethiopia and came from there to Madīnah. Some of his brothers and sisters died in Ethiopia on their way to Madīnah after drinking from a stagnant, toxic pool. Ibn Ḥajar, Al-'Iṣābah, 1:15.

[2] Arabic: "Wa hiya min al-'amr al-ladhī lam yazal ᶜalaihi 'n-nās ᶜindanā."

[3] Muwaṭṭa', 2:501-502.

ibn Dhakwān[1] are reported to have held contrary to Mālik's AN that ᶜaqīqah was obligatory [wājibah] and not merely desirable.[2] Mālik's use of the term AN may reflect this difference of opinion in Madīnah. This would be another instance of al-Laith ibn Saᶜd's disagreeing on a matter about which the Madīnans themselves had disagreed, whereas in his letter to Mālik he describes himself as the closest of followers to the Madīnans in those matters upon which they had reached consensus.[3]

Al-Ḥasan al-Baṣrī is reported to have held that ᶜaqīqah is performed in the case of boys but not in the case of girls; according to Ibn Rushd, this opinion was unique to al-Ḥasan. Both al-Ḥasan al-Baṣrī and his student Qatādah[4] are also reported to have held that cotton should be dipped in the blood from the ᶜaqīqah and that it should be daubed on the head of the infant.[5] Mālik holds, of course, that blood from the ᶜaqīqah is not supposed to be put on the head of the child. It is said that smearing the blood of the ᶜaqīqah on the head of the child was part of the pre-Islamic way of doing ᶜaqīqah and was rejected by Islam. Similar-

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[1]See above, pp. 63-64, n. 2. [2]Az-Zurqānī, 3:420.

[3]See above, pp. 321-330.

[4]QATĀDAH ibn Diᶜāmah as-Sadūsī (60-118/679-736) was a younger Successor and student of al-Ḥasan al-Baṣrī and several other older Successors. He was an important faqīh and Qur'ānic commentator. Qatādah was also known for his knowledge of Arabic poetry, genealogy, and history. Sezgin, 1:31.

[5]Ibn Rushd, (Istiqāmah), 1:449-450.

ly, it is said that the permission to break the bones of the ᶜaqīqah after it had been slaughtered constituted a rejection of the pre-Islamic practice of ᶜaqīqah, according to which the meat had to be severed at the joints and no bones could be broken. The reason for this, as az-Zurqānī indicates, was probably because the pre-Islamic Arabs looked upon breaking the bones as an ill omen for the child's health and safety.[1]

Ash-Shaibānī states in his recension of the Muwaṭṭa' that ᶜaqīqah was a pre-Islamic custom which had been practiced during the first part of the Prophet's career but was later abrogated. He then states that the ᶜīd of sacrifice [ᶜīd al-'aḍḥā; the second ᶜīd] abrogated all types of sacrifice that had been before it; the fast of Ramaḍān abrogated all types of fasting that had preceded it; ghusl al-janābah--a type of bath one gives oneself after sexual relations with one's marital partner--abrogated all preceding rites of bathing; and zakāh abrogated the types of charity which had preceded it.[2] Somewhat similarly, 'Abū Ḥanīfah is said to have held that ᶜaqīqah was neither obligatory nor a part of the sunnah. He held, rather, that it is something one is permitted to do voluntarily [taṭawwuᶜ], and, unlike Mālik, he held that one should sacrifice two sheep for a boy and one for a

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[1]Az-Zurqānī, 3:420; al-Bājī, 3:103-104; Ibn Rushd, (Istiqāmah), 1:449-450.

[2]Ash-Shaibānī, Muwaṭṭa', p. 226.

girl, which is supported by certain ḥadīth which report the Prophet having sacrificed two sheep each for Ḥasan and Ḥusain.[1]

Again the precept in this ᶜamal chapter is a matter of ritual, and it is of the category of ᶜamal naqlī. It is a pre-Islamic custom which, as the preceding discussion indicates, had been modified somewhat with the coming of Islam. Furthermore, Mālik cites a ḥadīth just prior to this ᶜamal chapter which indicates that the Prophet permitted ᶜaqīqah, although he apparently disliked its name because of the connection between it and "ᶜuqūq" [disobedience (to God, parents, etc.)] which comes from the same verbal root. He then cites two āthār which give information about how Fāṭimah, the Prophet's daughter, performed ᶜaqīqah in the case of her sons and daughters, Ḥasan, Ḥusain, Zainab, and 'Umm Kulthūm.[2] The expression that Mālik uses at the end of the ᶜamal chapter indicates that ᶜaqīqah is a well-established Madīnan ᶜamal with continuity over the past back to the time of the Prophet: "it is one of the customs ['amr] which the people among us have always been holding to."

Mālik cites several texts in this ᶜamal chapter which give some of the details of the AN precept which comes at the end, such as, for example, the point that ᶜaqīqah consists of one sheep for each child, whether a girl or a boy. Much

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[1]Al-Bājī, 3:102; az-Zurqānī, 3:419; Ibn Rushd, (Istiqāmah), 1:448-449.

[2]Muwaṭṭa', 2:500-501.

of the information in the AN precept, however, is taken directly from ᶜamal without any textual references, such as, for example, the details that the bones of the ᶜaqīqah may be broken when it is being cut up and that none of the blood from the ᶜaqīqah is to be put on the head of the child.

The āthār which Mālik cites just prior to this ᶜamal chapter state that Fāṭimah, the daughter of the Prophet, used to shave off the hair of her children when performing ᶜaqīqah for them and give the weight of their hair in silver as charity. By not including these āthār in the ᶜamal chapter, Mālik is indicating, I believe, that he does not regard this practice of Fāṭimah to be part of the normative ᶜamal of ᶜaqīqah.[1] Mālik has probably drawn this distinction between these actions which Fāṭimah is reported to have done and the actions which ᶜAbd-Allāh ibn ᶜUmar and ᶜUrwah ibn az-Zubair are reported to have done, which are in the ᶜamal chapter, on the basis of his knowledge of the normative ᶜamal of Madīnah. Thus, this would be another example of Mālik's reliance upon the non-textual source of Madīnan ᶜamal to differentiate between legal texts that report normative actions and texts that report non-normative actions.[2]

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[1]Compare, for example, the ᶜamal chapter discussed earlier regarding whether or not having a nosebleed breaks wuḍū'. Mālik cites reports of actions prior to the ᶜamal chapter which he does not regard to be normative, and he includes the reports of actions which he regards to be normative in the ᶜamal chapter. See above, pp. 188-195.

[2]See above, pp. 436-481.

Finally, one should note Mālik's use of analogical reasoning in his discussion of the ᶜamal of ᶜaqīqah. He states that it is analogous to [bi-manzilat; lit., of the same status as] other types of ritual sacrifice. He then states a consequence of that analogy, namely, that animals which are one-eyed, emaciated, sick or which have broken bones are not to be used in ᶜaqīqah just as they are not suitable in other types of ritual sacrifice.

7. Alx: The Size of the Diyah in Gold and Silver

> Mālik cites a report which states that ᶜUmar ibn al-Khaṭṭāb assessed [qawwama] the diyah [indemnity][for manslaughter or murder] at 1000 pieces of gold for people who used gold currency ['ahl adh-dhahab] and 12,000 pieces of silver for people who used silver currency ['ahl al-wariq]. Mālik then explains that the Syrians and Egyptians are users of gold and the Iraqis are users of silver. He states that he has heard it transmitted that the diyah is to be given in installments over three years or four years. He states that the installment period of three years is the preferable period to him regarding what he has heard transmitted in this matter. Finally, Mālik states that it is the AMN that camels are not an acceptable diyah for users of gold and silver, and gold and silver are not acceptable diyah's for people who use camels ['ahl al-ᶜamūd; lit., the tent dwellers; i.e., the bedouins]. Similarly, gold is not an acceptable diyah for users of silver, and silver is not an acceptable diyah for users of gold.[1]

There was a difference of opinion between 'Abū Ḥanīfah and the Madīnans on the size of the silver diyah. 'Abū Ḥanīfah claimed that ᶜUmar had set it at 10,000 pieces of silver instead of 12,000. Ash-Shaibānī, as noted earlier,

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[1]Muwaṭṭa', 2:850.

held that the ratio between gold and silver currencies was 1:10, as in the case of the relationship between the amounts of gold and silver upon which zakāh is taken; the Madīnans held, on the other hand, that the 1:10 relationship between gold and silver in zakāh is contrary to analogy and that the correct ratio between gold and silver currencies was 1:12, as reflected in Mālik's 'athar about ᶜUmar ibn al-Khaṭṭāb.[1] The difference of opinion between the Madīnans and Kūfans in this matter, furthermore, is one in which each side has āthār that contradict the contentions of the other.

In so far as the AMN precept in this example is concerned, namely, that camels do not constitute an acceptable diyah for users of gold and silver, and so forth, I have been unable to find accounts on to what extent it was a matter of agreement or disagreement among the fuqahā'. The source of this AMN precept is not clearly given. It is a precept, however, which would have probably been articulated after ᶜUmar ibn al-Khaṭṭāb had assessed the diyah's for gold and silver. I think it is unlikely that the relationship between diyah's in camels--the diyah in camels is said to be the only diyah which authentic ḥadīth report the Prophet as having set[2]--and diyah's in gold and silver would have been made clear at a time when the diyah's in gold and silver

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[1]See above, pp. 553-554, and al-Bājī, 7:68; az-Zurqānī, 5:137-139; Ibn Rushd, 2:248 (8).

[2]See Muwaṭṭa', 2:849 and above citations.

had not yet been assessed officially. It would appear, therefore, that this AMN precept goes back to the ijtihād of the Madīnan fuqahā'. It may well be that it goes back to the ijtihād of the Companions and was done after the assessment of the gold and silver diyah's. Even that, however, is a matter of speculation and is not clearly indicated in the text.

Unlike the previous ᶜamal chapters, the precept of this chapter does not pertain to a ritual of worship; as mentioned earlier, it is exceptional in that regard.[1] The basis upon which ᶜUmar ibn al-Khaṭṭāb made his assessment of the diyah's of gold and silver is also not clear from the text. Many held that it was the product of ᶜUmar's ijtihād and was based on the value in terms of gold and silver of the diyah of camels, which the Prophet had set at 100 camels. This was to be ash-Shāfiᶜī's opinion also, and he held for that reason, in contrast to 'Abū Ḥanīfah and Mālik, that the diyah's of gold and silver are not fixed amounts but vary with the fluctuation of the value of the 100 camels which make up the camel diyah.[2]

Some held, however, as al-Bājī indicates, that ᶜUmar's assessment of the diyah's of gold and silver had been based on knowledge which he had from the Prophet and not on the

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[1]See above, pp. 673-677.

[2]Al-Bājī, 7:68-69; az-Zurqānī, 5:137-139; Ibn Rushd, 2:248 (8).

basis of the monetary value of the diyah of camels. Al-Bājī adds that there is a ḥadīth which supports this interpretation but that it is not regarded as having well-established authenticity. It would appear likely, however, that both 'Abū Ḥanīfah and Mālik regarded the diyah's which ᶜUmar ibn al-Khaṭṭāb established in gold and silver to have been based on knowledge which he had from the Prophet since neither of them is reported to have held that the amount of these diyah's could fluctuate with the market value of camels. Hence, as al-Bājī indicates, they must have regarded these monetary diyah's to have been established independently.[1] In such a case the ᶜamal regarding the size of the diyah's in gold and silver would be of the category of ᶜamal naqlī. Nevertheless, placing it in that category is a matter of conjecture, and Mālik again does not give any apparent indication of what he regarded the ultimate source of this ᶜamal to have been. He undoubtedly regarded this ᶜamal to be authoritative, however, and one may reflect in that regard on Mālik's comments on the authoritativeness of the early caliphs in his letter to al-Laith ibn Saᶜd.[2]

Finally, Mālik indicates in this chapter that he has heard two opinions from the Madīnan ᶜulamā' regarding the installment periods over which diyah's are to be paid. Some have told him that it should be a three year period, and oth-

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[1]Al-Bājī, 7:68. [2]See above, pp. 314-321.

ers have told him that it should be four. Mālik then states that his preference regarding that which he has heard transmitted in this matter is that it be three years. Since both of these opinions are included in the ᶜamal chapter, this would be another instance of mixed ᶜamal, I believe, as in the ᶜamal chapter on mash.[1] In this case, however, the ᶜamal comes under the authority of the judiciary. Thus, this must have been a mixed judicial ᶜamal. Some judges must have handed down rulings stipulating a three years period, while other judges stipulated four, or the judges may have alternated between these stipulated installment periods according to the circumstances of the cases that were brought before them.

Conclusions

The Affirmative ᶜAmal Terms

Most of the precepts which I analyzed in this chapter in connection with which Mālik uses affirmative ᶜamal terms involved differences of opinion between the Madīnans and Kūfans. In the second example of the chapter there was no difference of opinion among them regarding the precept which Mālik describes as continuous ᶜamal, namely, that musāqāh may be done on agricultural lands that contain some open areas, but 'Abū Ḥanīfah, Sufyān ath-Thawrī, Ibn 'Abī Lailā, ash-Shaibānī, and even the Egyptian al-Laith ibn Saᶜd are reported to have disagreed with Mālik's analogical rea-

[1]See above, pp. 652-656.

soning in the matter, by means of which he determined what the maximum amount of the open agricultural land could be on such properties before musāqāh would be prohibited.[1] The fourth example involved a difference of opinion between the Madīnans, on the one hand, and the Kūfans and Baṣrans on the other. The third example involved a difference of opinion in Madīnah and is an example of Madīnan ᶜamal regarding which there was no local consensus but which was ᶜamal nevertheless. In that example I was unable to determine whether or not there was agreement or disagreement on the matter outside Madīnah; one might expect, however, that there was, that is, if ash-Shāfiᶜī's contention is correct that there was never a difference of opinion on a matter in Madīnah but that there were differences regarding it outside Madīnah as well.[2]

The first three affirmative ᶜamal precepts appear to be of the category of ᶜamal naqlī; the first two examples are instances of Mālik's using ᶜamal naqlī to provide legal information which is not to be found in the texts which he cites or for which he cites no legal texts at all. They pertain to the realm of ᶜumūm al-balwā: buying animals and making farming contracts on agricultural lands. In the first example Mālik indicates that the precept in question is supported by Madīnan local consensus and has continuity with past by citing the term -zxīb in connection with the affirma-

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[1]See above, pp. 618-623. [2]See above, pp. 343-348.

tive ᶜamal term. In the third example Mālik relies upon the non-textual source of Madīnan ᶜamal supported by a report of an action which Ibn ᶜUmar did in order to provide an interpretation of the legal implications of a Qur'ānic verse of conjectural meaning. The fourth example appears to be of the category of what legal theorists later called "ᶜamal qadīm", i.e., ᶜamal which went back to the ijtihād of the Companions. This is one of several examples of such ᶜamal, however, in which it is clear that the Companions put the precept into practice but in which the ultimate source of the ᶜamal is not clear. It may have been based on their ijtihād, and it may also have been based on knowledge which they had which was not transmitted to subsequent generations.

The Negative ᶜAmal Terms

Again differences between the Madīnans and Kūfans are a frequent characteristic in these precepts. In the fourth example of the section on negative ᶜamal terms, however, the primary difference of opinion comes from the Madīnans ᶜAbd-Allāh ibn ᶜUmar and Saᶜīd ibn al-Musayyab as well as al-Ḥasan al-Baṣrī, al-'Awzāᶜī, and al-Laith ibn Saᶜd; 'Abū Ḥanīfah and Sufyān ath-Thawrī of Kūfah agree with Mālik on the point in that example about which these others disagree, but they disagree with Mālik regarding the second part of that example--baiᶜ al-khiyār--whereas 'Abū Yūsuf and ash-Shaibānī took a position on the entire matter which was very

close to Mālik's. I could find evidence of no differences of opinion during Mālik's time on the third and fifth examples in this section. The primary characteristic of all of the examples in which Mālik uses his negative ᶜamal terms, however, appears to be one of Mālik's indicating that he does not regard the obvious [ẓāhir] or explicit meaning of the text cited to be legally valid because of the fact that it has not been accompanied by Madīnan ᶜamal.

In these examples of Mālik's use of the negative ᶜamal terms, therefore, one sees how authoritative Mālik regarded the non-textual source of Madīnan ᶜamal to be as a reference against which to interpret the textual sources of law. The manner in which Mālik uses ᶜamal in these examples reflects the principle of legal theory which Ibn al-Qāsim sets forth in the Mudawwanah, namely, that no legal texts will be regarded to be legally valid unless they have been accompanied by ᶜamal. Ibn al-Qāsim also states in that quotation that he does not doubt the authenticity of all such texts which have not been accompanied by ᶜamal; his principle is that whatever the reason for the discrepancy between the legal implications of such texts and the content of ᶜamal, it is not valid to institute such legal implications into ᶜamal if the first generations of Muslims did not do so.[1] Ash-Shāṭibī develops this principle of legal theory in his Muwāfaqāt. The Companions and the first generation of Muslims,

[1]See above, pp. 180-181.

he holds, understood the practical implications of the legal statements that were addressed to them. Therefore, if a text seems to have a semantic implication but the first generations did not put that implication into practice, it is most probable that that practical implication was not actually intended. It may have been abrogated, there may be some mistake in the wording, it may be that the wording appears to imply what it actually does not, and so forth. One adheres to the ᶜamal of the first generations, ash-Shāṭibī holds, instead of the contrary implications of legal texts because of the probability that the contradictions between their ᶜamal and the implications of formally authentic legal texts may be apparent but not real.[1] Such an approach to legal texts, of course, is virtually the opposite of the ẓāhirī literalist approach, according to which it is always the obvious or apparent semantic implication of the text which takes priority.

As indicated in some of these examples in which Mālik uses the negative ᶜamal terms, it is the apparent meaning of the contrary text which conflicts with ᶜamal, whereas the texts also carry implications which are not obvious but which are in conformity with ᶜamal. Al-Bājī suggests in some cases that the texts with which Mālik uses these negative ᶜamal terms are actually supportive of ᶜamal. Mālik cites the negative ᶜamal terms in such cases, however,

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[1]See above, pp. 509-514.

al-Bājī suggests, because most people are not capable of comprehending anything but the obvious [ẓāhir] meaning of texts, even if other interpretations are explained to them over and over again. Hence, al-Bājī believes that Mālik cites the negative ᶜamal terms in such cases because it is more simple and reliable than relying upon the capacity of his readers and transmitters to understand interpretations which are not obvious.[1]

It might also be pointed out that the āthār and ḥadīth with which Mālik uses his negative ᶜamal terms are isolated reports. Some of them, furthermore, pertain directly to the realm of ᶜumūm al-balwā such that one would expect the knowledge and practice of them to be widespread if it had actually been intended that they be put into practice, for example, customary manners of buying and selling, laws pertaining to nursing children, and so forth.[2] These are also examples, therefore, of Mālik's reliance upon ᶜamal to reject contrary isolated legal texts, and, as Ibn Rushd observes, it is cognate in that regard to 'Abū Ḥanīfah's rejection of isolated ḥadīth which pertain to ᶜumūm al-balwā and which carry legal implications that are not generally known or regarded to be valid by the early fuqahā'.[3]

There are instances in these examples of Mālik's re-

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[1]See above, pp. 632-640.

[2]See above, pp. 636-648.

[3]See above, pp. 481-484.

lying upon ᶜamal to distinguish between reports of actions which he regards to be non-normative [i.e., not ᶜamal] and reports of actions which he regards as reflecting the desired norm.[1] In the case of baiᶜ al-khiyār, Ibn ᶜAbd-al-Barr holds that Mālik regarded the legal implications of the first part of the ḥadīth to have been abrogated, and he believes Mālik indicates that in the text of the Muwaṭṭa' by the ḥadīth which he places after the ḥadīth on baiᶜ al-khiyār; he cites a report attributed to Mālik according to which Mālik refers to the implications of the first part of the ḥadīth on baiᶜ al-khiyār as one of those matters which had been put aside [turika] and had not become part of ᶜamal.[2] This example, according to Ibn ᶜAbd-al-Barr's interpretation of it, therefore, would be an instance of Mālik's using ᶜamal as a means of establishing that the precept of one ḥadīth had been abrogated while the precept of a contrary ḥadīth--namely, the ḥadīth Mālik cites after the ḥadīth on baiᶜ al-khiyār had not been. The statement attributed to Mālik about the precept in the first part of the ḥadīth on baiᶜ al-khiyār having been abrogated reminds one of Ibn al-Qāsim's statement in the Mudawwanah. Furthermore, if Ibn ᶜAbd-al-Barr's interpretation is correct, this would be an instance where Mālik regarded part of the text of a ḥadīth to have been ab-

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[1]See above, pp. 436-448, 490-497.

[2]See above, pp. 640-648.

rogated, while regarding another part of the text to still be a valid part of the law. Ash-Shāfi^{c}ī objects very strongly in "Ikhtilāf Mālik" to a similar example in which the Mālikīs have held on the basis of Madīnan ^{c}amal that part of a ḥadīth regarding praying noon and afternoon prayers together or sunset and evening prayers is still a valid part of ^{c}amal while part of the ḥadīth had been abrogated. Since there are no textual references for their distinction and since ash-Shāfi^{c}ī does not regard the non-textual source of Madīnan ^{c}amal to be legitimate, he rejects this distinction.[1]

Example five in this section is an instance of a precept of Madīnan ^{c}amal regarding which there were differences of opinion among the Madīnan people of knowledge. In this case, however, the precept, which pertains to what constitutes an agreement to buy or sell, came under the jurisdiction of the Madīnan judiciary. Hence, it is one of those matters regarding which the authority of the judiciary would have been able to create and maintain uniform ^{c}amal according to that opinion of the Madīnan people of knowledge which it regarded to be correct. Similarly, in the ^{c}amal chapters there was a difference of opinion among the Madīnan ^{c}ulamā' regarding whether or not martyrs who die on the battlefield should be washed, shrouded, and prayed over prior to burial. The ^{c}amal in such cases, however, would have come under the

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[1]Ash-Shāfi^{c}ī, "Ikhtilāf Mālik," p. 205.

discretion of Madīnan executive authority, such as that of the 'amīr [commander] who led the army.[1]

The ᶜAmal Chapters

In the ᶜamal chapters I have analyzed one finds the characteristic pattern of differences between the Kūfans and Madīnans, although in some cases the differences are quite slight--as, for example, in the chapter on how one is to sit while making ṣalāh[2]--and generally the differences are only regarding a limited part of the entire ᶜamal which Mālik sets forth.[3] In four of the chapters analyzed Mālik inserts other terminological expressions: S-XN, S, AN, and AMN.[4] It is noteworthy that there were apparently no significant differences of opinion among the fuqahā' at any time regarding the precept for which Mālik cites the term S-XN. Various 'Umayyad governors and heads of state, however, are reported to have attempted to establish ᶜamal contrary to that precept, and Mālik seems to have used the term with reference to them. Mālik follows that S-XN term, as mentioned, with one of the most explicit statements of the concept of ᶜamal naqlī in the Muwaṭṭa'.[5] It might also be noted that the two sunnah terms which occur in the ᶜamal chapters

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[1]See above, p. 667. [2]See above, p. 657.

[3]See above, pp. 661-663; 652-653; 665-666.

[4]See above, pp. 659-661; 666-667; 671-672; 674-675.

[5]See above, pp. 659-660.

I have analyzed are, like the other sunnah terms in the Muwaṭṭa' which I have studied, contrary to analogy with related precepts of law, and in these examples again the opinions contrary to the sunnah precepts are opinions that have extended those analogies to include the matters to which the sunnah precepts pertain.[1]

All of the precepts of these ᶜamal chapters pertain to matters of religious ritual except for the seventh example, which pertains to the size of the diyah in gold and silver. They are all of the category of ᶜamal naqlī, again with the possible exception of the seventh example, in which the ultimate source of the ᶜamal is difficult if not impossible to determine.[2] In the ᶜamal chapter on ᶜaqīqah, Mālik states that the precept has always been ["lam yazal"] one of the customs of the people of Madīnah, indicating that this originally pre-Islamic custom which had been somewhat modified by Islam had been a continuous part of Madīnan ᶜamal over the generations.[3]

Mālik cites several texts--generally āthār and especially āthār reporting actions or statements of ᶜAbd-Allāh ibn ᶜUmar--in some of the ᶜamal chapters I have analyzed. Sometimes Mālik provides no additional information to what is already contained in the texts he cites. Use of āthār, as

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[1]See above, pp. 660-661, 666-667. [2]See above, pp. 675-676.

[3]See above, pp. 668-672.

discussed earlier, is an important part of Mālikī, Ḥanafī, and Ḥanbalī legal theory. One of the advantages of using āthār is that they can indicate more conclusively than ḥadīth whether or not a matter which the Prophet is reported to have done or spoken about was abrogated.[1] It may be for this reason that Mālik relies heavily on āthār in these ᶜamal chapters; ash-Shaibānī argues that ᶜaqīqah, for example, was a pre-Islamic custom which had been abrogated, and Mālik cites reports to the effect that it was not only done in the case of the Prophet's grandchildren but that the Companion Ibn ᶜUmar continued to do it in the case of the newly born children in his extended family and that the prominent Madīnan Successor ᶜUrwah ibn az-Zubair did likewise. Mālik then adds that ᶜaqīqah has been a continous part of the ᶜamal of the Madīnan people.[2]

Nevertheless, even though āthār are a useful ancillary in establishing that a matter was not abrogated, they are not always a conclusive indication of that fact. Furthermore, it is not always possible to determine from āthār which report actions of Companions whether or not those actions constitute a desired norm. Thus, by placing āthār which report actions in ᶜamal chapters, Mālik indicates that the actions reported in them constitute the desired norm. In the ᶜamal chapter on ᶜaqīqah, for example, Mālik reports actions which

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[1]See above, pp. 488-490. [2]See above, pp. 668-673.

Ibn ᶜUmar and ᶜUrwah ibn az-Zubair are reported to have done when performing ᶜaqīqah. Just prior to the ᶜamal chapter, however, he cites reports of actions that Fāṭimah is reported to have done when she performed ᶜaqīqah for her children. By not including Fāṭimah's actions in the ᶜamal chapter, Mālik appears to be indicating that what Fāṭimah is reported to have done does not constitute the desired norm in ᶜaqīqah, and, as pointed out, there are other examples of this in the Muwaṭṭa'.[1] According to ash-Shāṭibī, one of the most important uses of ᶜamal in interpreting legal texts is that it enables the faqīh to draw distinctions like these between reports of normative and non-normative actions.[2]

Mālik's reliance in these ᶜamal chapters upon the statements and actions of prominent Madīnan people of knowledge like ᶜUrwah ibn az-Zubair, az-Zuhrī, al-Qāsim ibn Muḥammad, but especially ᶜAbd-Allāh ibn ᶜUmar indicates in what high esteem he held them. One can consider in this regard the statements in Mālik's letter to al-Laith ibn Saᶜd, according to which he holds that those persons assumed authority in Madīnah after the Prophet's death who followed his example most closely. In that letter Mālik continues to say that the Madīnan Successors continued to follow the same course as the Companions and that this is a legacy in Madīnah which no other city can claim for itself.[3] Mālik portrays

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[1]See above, pp. 668-672. [2]See above, pp. 436-448.

[3]See above, pp. 316-317.

this legacy in some of the ᶜamal chapters. In the ᶜamal chapter regarding how one is supposed to sit while performing ṣalāh, for example, Mālik cites āthār which portray Ibn ᶜUmar as a guardian of ᶜamal, as it were, and he concludes the chapter by citing a report according to which al-Qāsim ibn Muḥammad teaches people how they are to sit while performing the ṣalāh and states that Ibn ᶜUmar had taught it to him and had said that it was also the practice which his father, ᶜUmar ibn al-Khaṭṭāb, used to do.[1]

There were examples in two of these chapters of what I believe to be mixed ᶜamal, i.e., types of Madīnan ᶜamal in which there were more than one way of doing the matter. In the ᶜamal chapter on masḥ, for example, Mālik cites reports which indicate two ways of performing masḥ, and Mālik states which of them he prefers. The ᶜamal in this case did not come under the authority of the Madīnan judiciary.[2] Regarding the ᶜamal of what the installment periods should be over which diyah's are to be paid, Mālik indicates that there were two opinions: three years or four years. He again states his preference, namely, three years. In this case, however, the ᶜamal did come under the jurisdiction of the Madīnan judiciary. Some judges may have preferred one period, while others preferred another, or it may have been

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[1]See above, pp. 656-658.

[2]See above, pp. 652-656.

that they set the periods according to the circumstances of the case.[1]

Finally, it might be noted that I found two examples of analogical reasoning in the precepts studied in this chapter on ᶜamal terms. The first was in the case of the ᶜamal regarding musāqāh.[2] The other is the analogy which Mālik draws between ᶜaqīqah and other types of ritual sacrifice, such as the sacrifices done during the pilgrimage.[3] Not only are these examples of Mālik's familiarity with analogical reasoning, but it is also to be noted that both are instances of analogical reasoning made on the basis of established precepts of law, which, as discussed earlier, is an important characteristic of Mālikī and Ḥanafī analogical reasoning.[4]

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[1]See above, pp. 676-677. [2]Above, pp. 618-622.
[3]Above, pp. 668-672. [4]Above, pp. 226-234.

CHAPTER X

'AMR TERMS SUPPORTED BY LOCAL CONSENSUS

General Observations

There are a variety of 'amr terms in the Muwaṭṭa' that stand for Madīnan local consensus. I have divided them, however, into two major divisions: 1) those which give explicit indication of total Madīnan consensus by stating that there were no differences of opinion regarding them and 2) those which refer to local consensus [ijtimā^{c}] but do not give this explicit indication of total consensus. The two most common examples of the first division are the terms AMN-X ["al-'amr al-mujtama^{c} ^{c}alaihi ^{c}indanā wa 'l-ladhī lā 'khtilāf fīhi;" that 'amr regarding which there is consensus among us and regarding which there are no differences of opinion] and A-XN ["al-'amr al-ladhī lā 'khtilāf fīhi ^{c}indanā;" that 'amr regarding which there are no differences of opinion among us]. AMN-X occurs seven times; in four of these instances the expression ẋdIb ["wa hādhā 'l-ladhī 'adraktu ^{c}alaihi 'ahl al-^{c}ilm bi-baladinā"] is used with it. The expression A-XN, on the other hand, occurs twelve times by itself and twelve times with slight changes or in various

combinations; hence, A-XN occurs twenty-four times in all.[1]

The most common example of the second category of terms standing for Madīnan local consensus is the term AMN ["al-'amr al-mujtama^{c} ^{c}alaihi ^{c}indanā;" that 'amr upon which there is consensus (ijtimā^{c}) among us], which occurs forty-three times by itself and six times in various combinations.[2] Occurring forty-nine times in all, AMN is the second most common term in the Muwaṭṭa', the most common being AN, which is discussed in the next chapter. The expression -zĀIb ["wa hādhā 'l-'amr al-ladhī lam yazal ^{c}alaihi 'ahl al-^{c}ilm bi-baladinā"], which was discussed earlier, also apparently stands for Madīnan consensus,and, hence, would be another 'amr term of the category to which AMN belongs.[3]

It may be that there is no difference between the type of local consensus indicated by the first and second divisions of the 'amr terms which stand for local consensus. Nevertheless, I believe that it is important to take account of the clear semantic differences between the wording of the terms of these two categories. As stated earlier, it may be the case that terms like AMN-X and A-XN, which explicitly deny the presence of differences of opinion regarding them, stand for a total consensus, whereas the term AMN stands for a majority consensus--perhaps a preponderant ma-

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[1]For these references in the Muwaṭṭa', see appendix 2 below.

[2]See appendix 2. [3]See above, pp. 583-585.

jority consensus--of the people of knowledge in Madīnah whom Mālik regarded to be the constituents of Madīnan consensus.[1]

Examples

1. AMN: Regarding Use of a Magian's Hunting Dogs

> Mālik states that it is the AMN that the catch a Muslim hunter procures by using the hunting dogs of a Magian is ḥalāl [permissible to eat], even if the dogs kill the catch before the hunter can reach it and slaughter it Islamically. Mālik states that this is analogous ["wa 'innamā mathal dhālika"] to a Muslim's using the knife of a Magian to slaughter an animal or his using the bow and arrow of a Magian to hunt with. Mālik continues to say that the catch of a Magian hunter who uses a Muslim's trained hunting dogs is not ḥalāl for a Muslim unless the Muslim apprehends the catch before it dies or is killed and slaughters it Islamically. Mālik states that this is analogous ["wa 'innamā mathal dhālika"] to a Magian's using the knife of a Muslim to slaughter an animal or his using the bow and arrow of a Muslim to hunt with.[2]

Mālik and 'Abū Ḥanīfah are reported to have held the same opinion on the precept in this example. The Companion Jābir ibn ᶜAbd-Allāh,[3] however, and al-Ḥasan al-Baṣrī, ᶜAṭā' ibn 'Abī Rabāḥ, Mujāhid, and Sufyān ath-Thawrī are said to have disagreed. According to Ibn Rushd, they regarded it to be makrūh [reprehensible] that a Muslim eat the catch

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[1]See above, pp. 424-428.

[2]Muwaṭṭa', 2:494.

[3]JĀBIR IBN ᶜABD-ALLĀH ibn ᶜAmr al-Khazrajī (16bh-78/607-697) was an important Madīnan Companion and was regarded as being very knowledgeable of Islam. He is reported to have kept a compilation of ḥadīth, which is known as the "Ṣaḥīfah" of Jābir. Sezgin discusses the transmission of the work and believes that all of its contents are probably contained in the Musnad of Ibn Ḥanbal. Sezgin, 1:85. Jābir is said to have been the last Companion to have died in Madīnah; see Azmi, p. 52.

he procures by using the trained hunting dogs of a Magian. Their reason, Ibn Rushd holds, is that the Qur'ānic verse which makes the catch of trained hunting dogs permissible is addressed to Muslim believers and pertains specifically to dogs which they have trained to hunt.[1]

Mālik's AMN, on the other hand, as his commentators point out and as is indicated by the analogies he cites in the Muwaṭṭa', is that trained hunting dogs are only the instrument of the hunt and that the permissibility of the catch is determined by religious affiliation of the hunter, not by the instrument which he uses.[2]

The references I have consulted mention no ḥadīth to support Mālik's AMN or the opinions contrary to it. It is apparently a product of ijtihād, as would appear to be indicated by Mālik's citation of the analogy which he regards as supporting the validity of the AMN. Even the contrary opinion of Jābir ibn ᶜAbd-Allāh and others, according to Ibn Rushd's understanding of it, was based on their interpretation of the implications of the pertinent Qur'ānic verse, which speaks of dogs which Muslims have trained, while making no reference to other types of hunting dogs. If this AMN originated around the time of the dissenting opinion of

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[1]Ibn Rushd, (Istiqāmah), 1:448. The pertinent verse is Qur'ān, 5:4.

[2]See al-Bājī, 3:127; az-Zurqānī, 3:404; Ibn Rushd, (Istiqāmah), 1:448.

the Companion Jābir ibn ᶜAbd-Allāh, one would classify this precept as being of the category of what later legal theorists called "ᶜamal qadīm", "ancient" ᶜamal which began with the ijtihād of the Companions.[1] But Mālik gives no indication of the ultimate source of this ᶜamal in the Muwaṭṭa'. On the contrary, the information which he deems it significant to communicate is that this precept, whatever its ultimate source, is supported by Madīnan ijtimāᶜ.

If the report is correct that the Madīnan Companion Jābir ibn ᶜAbd-Allāh disagreed with this AMN precept, that disagreement, of course, constitutes a disagreement within Madīnah. It may be because of Jābir's disagreement that Mālik does not say that this is a matter regarding which there were no differences of opinion. His AMN, therefore, may refer to a preponderant majority consensus of the Madīnan people of knowledge, excluding Jābir.

The analogy in this example is significant. It is an instance of analogical reasoning based on precepts instead of texts.[2] But, in addition to that, even if the ultimate source of the analogy is unknown, Mālik's citation of the analogy indicates, nevertheless, that he regarded this precept to be analogous to others. The nature of this AMN precept, therefore, is different than the nature of the sunnah precepts not only in that it appears to be the prod-

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[1]See above, pp. 415-419. [2]See above, pp. 226-234.

u c t of ijtihād and does not go back to Prophetic authority but also because it is analogous to related precepts of law, while the sunnah precepts are contrary to analogy with related precepts of law.

2. AMN: A Special Provision for the Testimony of Youths

> Mālik cites an 'athar which reports that ᶜAbd-Allāh ibn az-Zubair[1] used to hand down legal judgments on the basis of the testimony of youths [ṣibyān] in cases regarding injuries and wounds they had received from each other. Mālik states that it is the AMN that the testimony of youths is permissible when they inflict wounds or injuries upon each other. Their testimony must be taken before they break up or have had the opportunity to talk with those who might intimidate them or instruct them [to give false witness, etc.]. The testimony of youths is not permissible in other matters. Mālik adds that the testimony of youths under such circumstances is valid if they give it to reliable [ᶜudūl] adult witnesses before they break up.[2]

This precept is reported to have constituted a point of difference between the Madīnans and 'Abū Ḥanīfah, Sufyān ath-Thawrī, and, according to az-Zurqānī, the majority of the fuqahā', who held that the testimony of youths was impermissible under all circumstances.[3] As mentioned earlier, ar-Rasīnī cites this precept in his thesis as an example of an AMN regarding which there had also been differences of opinion in Madīnah. He holds that al-Qāsim ibn Muḥammad had not agreed to this precept because of a report that al-

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[1]For data, see above, p. 50, n. 1. [2]Muwaṭṭa', 2:726.

[3]Al-Bājī, 5:229; az-Zurqānī, 4:387; Ibn Rushd, 2: 279 (1).

Qāsim ibn Muḥammad held that the testimony of youths was not permissible.[1] It is possible that al-Qāsim did disagree with this AMN precept, in which case it would be an example of Mālik's citation of the term AMN for a matter regarding which there was a preponderant consensus in Madīnah--the following discussion cites reports of extensive agreement on this precept in Madīnah--but for which there was no total consensus among the Madīnan fuqahā'. Nevertheless, I do not believe that ar-Rasīnī has cited sufficient evidence to support his conclusion. According to his report, al-Qāsim has stated the general precept regarding the testimony of youths. It is clear from Mālik's wording of the AMN precept that he also subscribes to this general precept; he regards this AMN, however, to be a special exception to that general rule. More explicit information is required from al-Qāsim before it can be established that he did not also agree with the Madīnan fuqahā' on this special provision.

There are reports substantiating the agreement of numerous prominent Madīnans on this precept. Mālik cites himself the information that ᶜAbd-Allāh ibn az-Zubair put it into practice. Saḥnūn cites a report from Ibn Wahb according to which ᶜAlī ibn 'Abī Ṭālib, ᶜAbd-Allāh ibn ᶜUmar, Ibn Qusaiṭ, 'Abū Bakr ibn Ḥazm, and Rabīᶜah are said to have held to this precept as well as the early Iraqi qāḍī Shuraiḥ

[1]Ar-Rasīnī, p. 415; see above, p. 70, n. 2.

al-Kindī.[1] Saḥnūn states further that 'Abū 'z-Zinād ibn Dhakwān and ᶜUmar ibn ᶜAbd-al-ᶜAzīz regarded this precept to be sunnah.[2] It is also reported that Saᶜīd ibn al-Musayyab, ᶜUrwah ibn az-Zubair, and az-Zuhrī held to it as well as the prominent non-Madīnans ash-Shaᶜbī, Ibn 'Abī Lailā, Muᶜāwiyah, and 'Ibrāhīm an-Nakhaᶜī. Some reports also have it that Ibn ᶜAbbās agreed.[3]

The ultimate source of this ᶜamal is unclear. Although 'Abū 'z-Zinād and ᶜUmar ibn ᶜAbd-al-ᶜAzīz are reported to have held that it was sunnah; they seem to be unique in that claim, and Saḥnūn gives no indication of what the basis of their statement was. Ibn Juraij is said to have reported that none had held to this precept prior to ᶜAbd-Allāh ibn az-Zubair.[4] None of the sources I have consult-

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[1]Mudawwanah, 4:84-85;and al-Bājī, 5:229.
SHURAIḤ ibn al-Ḥārith ibn Qais al-Kindī (d. 78/697) was born in the Yaman during the life of the Prophet, whom, however, he never saw. Shuraiḥ was first appointed qāḍī in Iraq by the caliph ᶜUmar ibn al-Khaṭṭāb and continued on as qāḍī under ᶜUthmān and the 'Umayyads. He presided in Kūfah for sometime and then in Baṣrah; in all, he would have presided over the judiciary about sixty years. He was removed in 77/696 by al-Ḥajjāj. Shuraiḥ was regarded as one of the most important fuqahā' and qāḍī's of the early period; many legal opinions attributed to him are still preserved in works like that of Wakīᶜ. Shuraiḥ died at an advanced age. Sezgin, 1:402.

[2]Mudawwanah, 4:84-85. [3]Az-Zurqānī, 4:387; al-Bājī, 5:229.

[4]Al-Bājī, 5:229.
ᶜAbd-al-Malik ibn ᶜAbd-al-ᶜAzīz IBN JURAIJ (80-150 or 151/699-767 or 768)was an important Makkan Successor, muḥaddith, and faqīh. He is said to have been the first in Makkah to have arranged his compilation of ḥadīth systematically. Ibn Juraij died in Baghdād. Sezgin, 1:91.

ed cites any ḥadīth in support of the precept.

It would appear most likely that this precept is an instance of the ijtihād of Madīnan Companions and, hence, of the category of ᶜamal qadīm. Ibn Rushd holds, for example, that it is an instance of the Madīnan application of the principle of al-maṣāliḥ al-mursalah,[1] which would imply that there were no texts in the original sources of the law to support it. Ibn Rushd holds that the Madīnans did not regard the testimony of youths in this matter to be an actual testimony ["ḥaqīqatan"] but rather that they considered it to be a type of circumstantial evidence, which Ibn Rushd refers to as "qarīnat ḥāl". This is why, Ibn Rushd believes, Mālik stipulates in this precept that the testimony of the youths must be taken before they are allowed to split up or to have received the counsel of others. If the testimony of these youths were regarded to be an actual testimony in its own right, there would be no reason to make this stipulation.[2] As indicated in the discussion on al-maṣāliḥ al-mursalah, Mālikī fuqahā' accepted circumstantial evidence on the basis of al-maṣāliḥ al-mursalah,[3] and Mālik justifies the acceptance of circumstantial evidence in qasāmah on the basis of the principle of maṣlaḥah.[4]

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[1]See above, pp. 268-279.

[2]Ibn Rushd, 2:279 (10); cf. ash-Shāṭibī, Al-Iᶜtiṣām, 2:254.

[3]See above, p. 275. [4]See below, pp.713-723.

Al-Bājī also discusses the maṣalaḥah which he believes this precept is based upon; he points out that youths usually associate with their peers to the exclusion of adults and that they usually play by themselves. Furthermore, he continues, youths often engage in types of play and other activities which can bring injury to themselves and in some cases even death. Thus, if it were stipulated that the testimony of worthy adults were the only acceptable evidence in such cases, it would become virtually impossible to establish liability in cases of such injury and to award due compensation to the injured party.[1]

3. AMN: Regarding Inheritance Due an Illegitimate Son

> Yaḥyā ibn Yaḥyā states that he has heard Mālik say that it is the AMN that if a man who has more than one son tells one of them before he dies that a certain person is his [illegitimate] son, the testimony of that single son will not be sufficient to establish the kinship of the newly claimed son to the father. Nevertheless, the newly claimed son will receive that proportion of the brother's inheritance who is giving testimony which he would have ordinarily received from that brother, had the kinship of the illegitimate brother actually been established. Mālik gives the example of a man who dies, leaving two sons. The man leaves behind 600 pieces of gold, of which each son would have received 300 pieces. If one of these sons gives such a testimony, however, he will receive 200 pieces of gold; the illegitimate brother will receive 100 pieces; and the other brother will receive 300. Mālik says that this is analogous [bi-manzilat] to a woman who makes the claim that her deceased father or husband had owed someone a debt but regarding which there is no other evidence and which the other heirs deny to be true. The woman must pay to

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[1]Al-Bājī, 5:229.

> the creditor in that case the proportion of her share of inheritance that would have gone toward payment of that debt had there been sufficient evidence to establish the existence of the debt.[1]

This precept constituted a point of difference between the Madīnans and the Kūfans, who held that the legitimate brother giving testimony in this case regarding the kinship of his illegitimate brother would divide half of his share of the inheritance with the illegitimate brother. Like the Madīnans they held that the other brothers involved would not be required to share any of their inheritance with the newly claimed illegitimate brother, as long as his kinship to their father had not been sufficiently established. (In terms of Mālik's illustration, this would mean that the brother giving testimony would receive 150 pieces of gold; the newly claimed illegitimate brother would receive 150 pieces; and the other brother would receive 300.) Ibn Kinānah--one of Mālik's most prominent students and the one who assumed Mālik's position at the head of the Madīnan school after Mālik's death[2]--agreed with the Kūfan position. No indication is given, however, of whether or not Ibn Kinānah disagreed with Mālik on this matter before or after Mālik's death. Al-Laith ibn Sa^{c}d is also reported to have disagreed. He was of the opinion that the newly claimed illegitimate brother had no rights of inheritance from the father until there

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[1]Muwaṭṭa', 2:741-742. [2]See above, p. 84 , n. 3.

was sufficient evidence to establish his kinship to the father.[1] If the father had claimed the son as his own while upon his deathbed, as in the above example, at least two acceptable witnesses would be required.

None of the sources I have had access to cites any ḥadīth in support of this precept or in support of the opinions contrary to it. It would appear, therefore, to be an instance of ᶜamal that resulted from Madīnan ijtihād. Mālik's presentation of the analogy which he believes to support the precept might also be an indication of the fact that this precept had originated from ijtihād. No indication is given, however, of when the ijtihād underlying this precept originated. Again the information which Mālik deems significant to communicate is that this precept was supported by the ijtimāᶜ of the Madīnan ᶜulamā'.

The dissenting opinion of Ibn Kinānah, as mentioned above, may be an indication that there were differences of opinion on this AMN in Madīnah, and, hence, that it did not represent a total consensus of the Madīnan ᶜulamā'. As pointed out, however, it is not known whether Ibn Kinānah, a student of Mālik, took the Kūfan position in this matter before or after Mālik's death. The differing opinion of al-Laith ibn Saᶜd is also significant, since he describes himself in his letter to Mālik as a close follower of Madīnan local consensus, while reserving the right to disagree with them on

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[1]See az-Zurqānī, 4:421; al-Bājī, 6:17.

matters in which they themselves had disagreed.[1]

Finally, the analogy in this example is significant. Although Mālik gives no explicit indication that the ijtihād from which this AMN precept originated was based on that analogy, his citation of it indicates--as in example 1 of this chapter--that Mālik regarded this AMN precept to be analogical. Hence, it is not contrary to analogy with related precepts as is the case with Mālik's sunnah terms.[2] It might also be pointed out that this example of analogical reasoning, like all examples cited thus far from the Muwaṭṭa', is an instance of analogical reasoning based on precepts of law and not on specific texts.[3]

4. AMN: Permission to Alter Bequests Other than Tadbīr[4]

Mālik cites the ḥadīth: "No Muslim possessing anything in which a bequest [waṣīyah] is to be made has the right that [so much as] two nights pass before the

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[1]See above, pp. 321-331. [2]See above, pp. 576-582.

[3]See above, pp. 226-234.

[4]Tadbīr: A contractual obligation [ᶜaqd] by which a master promises the slave, who is then called a "mudabbar", that the slave will be free upon the master's death. Tadbīr is regarded to be an exceptional type of bequest [waṣīyah]. Like other bequests, it pertains to the disposition of the master's property--of which the slave would be regarded to be a part--after the master's death. Hence, like bequests, it exempts property of the master from the inheritance of the rightful heirs. Like other bequests, therefore, tadbīr can only be executed within one-third the master's estate (see Muwaṭṭa', 2:814). Tadbīr is an exceptional type of waṣīyah, however, in that it constitutes a binding contract which the master has no right to alter, once it has been made. See Ibn Rushd, (Istiqāmah), 2:381-385.

bequest has been put down in writing and is in his possession." Mālik then states that it is the AMN that a person may alter, as long as he is alive, whatever he wants to alter regarding bequests which he makes during times of health or illness which pertain to the emancipation of slaves of his or to other matters. He may discard the bequest altogether or alter it however he sees fit, except in the case of tadbīr. The stipulation of tadbīr, once given, may never be altered. Mālik explains this precept by reference to the preceding ḥadīth. This ḥadīth has stipulated that bequests must be put in writing as soon as possible. If it were not permissible, however, for the maker of such bequests to alter them after they had been made, it would follow that the property to which the bequest pertains would be restricted [maḥbūs] [from being sold, given as a gift, etc.] at the time the bequest was made, [which is not the case except in the instance of tadbīr]. Mālik then states that it is the A-XN that the maker of a bequest may change whatever he wants to in it except for tadbīr.[1]

There was widespread agreement among the early fuqahā', according to az-Zurqānī, regarding the validity of the precept that bequests could be altered or discarded during one's lifetime and that the stipulation of tadbīr could not be altered, once made, and that the mudabbar slave, therefore, could not be sold, given away as a gift, and so forth. Az-Zurqānī states that it was a point of agreement among the preponderant majority [jumhūr] of the early fuqahā' of the Ḥijāz, Syria, and Kūfah.[2] His expression would indicate, however, that it was, nevertheless, a point of difference, i.e., among those who were not part of this "preponderant majority". In the subsequent generations after Mālik's life, ash-Shāfiᶜī, Ibn Ḥanbal, and the Ẓāhirīs disagreed, for example, and, according to Ibn Rushd, they based their reason-

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[1]Muwaṭṭa', 2:761. [2]Az-Zurqānī, 5:75.

ing on a ḥadīth which reports that the Prophet once sold a mudabbar.[1] Al-'Awzāᶜī is said to have held that one could sell a mudabbar to a person who intended to set him free,[2] and it is possible that others held opinions similar to those of ash-Shāfiᶜī, Ibn Ḥanbal, and the Ẓāhirīs during the time of Mālik.

Nevertheless, 'Abū Ḥanīfah would not have agreed with Mālik's AMN precept, as set forth above. For Mālik is drawing a distinction in this precept between tadbīr and other types of waṣīyah which involve emancipation but which Mālik does not regard to be of the category of tadbīr. This distinction between tadbīr and other types of bequests involving emancipation is said to be a well-known part of Mālik's fiqh and is what he is referring to when he speaks in the AMN precept about bequests pertaining to emancipation of one's slaves which may be altered.[3] Many fuqahā', including 'Abū Ḥanīfah, according to Ibn Rushd, held that no such distinctions could be drawn between tadbīr and other types of bequests involving emancipation.[4]

It would appear from Mālik's discussion of this AMN that he regarded it to be of the category of ᶜamal naqlī. He reasons from the ḥadīth cited at the beginning of the

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[1]Ibn Rushd, (Istiqāmah), 2:383. [2]Ibid.

[3]See ibid., 2:381; al-Bājī, 7:45-47; az-Zurqānī, 5: 74-75.

[4]Ibn Rushd, (Istiqāmah), 2:381.

chapter that the Prophet required makers of bequests to put them into writing immediately. He reasons further that if it were not permissible to alter such bequests, it would follow as a legal consequence that there would be another precept in ᶜamal according to which the properties designated in bequests would be restricted from being sold, given as gifts, and so forth. There was no such ᶜamal except in the case of tadbīr, as Mālik indicates in another AMN precept pertaining to tadbīr.[1] Hence, Mālik's reasoning is apparently that the absence of ᶜamal restricting the disposal of properties designated by bequests is an indication that the Prophet permitted bequests to be altered when they pertained to matters other than tadbīr, for which there is such an ᶜamal. Lack of ᶜamal regarding the disposal of properties designated by bequests would be an instance of ᶜamal naqlī going back to what al-Qāḍī ᶜAbd-al-Wahhāb al-Baghdādī and ᶜIyāḍ refer to as the Prophet's "tark", i.e., his having omitted something from ᶜamal which would have been well-known if he had required it.[2] This seems also to be what Mālik has in mind in this case. The Prophet insisted that all persons making bequests put them in writing immediately. Hence, the designation of such properties would have been well-known; it follows, then, that the legal status of such properties would also have been well-known. Madīnan ᶜamal

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[1]Muwaṭṭa', 2:814. [2]See above, pp. 410-415.

in this case would pertain to the nature of *ᶜumūm al-balwā*.[1]

Mālik uses the term AMN at the beginning of this precept and the term A-XN at the conclusion. It would appear that this AMN, therefore, is also an A-XN. I do not believe that this is necessarily the case. For the A-XN is that bequests may be altered except in the case of *tadbīr*. The wording of the A-XN does not involve the definition of *tadbīr*; unlike the AMN, it involves no distinction between *tadbīr* and other types of bequests involving emancipation which Mālik does not regard as falling within the category of *tadbīr*. 'Abū Ḥanīfah could agree with the wording of the A-XN, but, as pointed out above, 'Abū Ḥanīfah could not agree with the wording of the AMN. For 'Abū Ḥanīfah regards all bequests involving the emancipation of one's slaves to be types of *tadbīr*.

The AMN precept contains elements that are analogous and elements that are contrary to analogy. The analogous part of the precept is the provision that there are types of bequests pertaining to emancipation that are completely analogous to other types of bequests and are not the same as *tadbīr*. The part of the precept contrary to analogy is the stipulation that *tadbīr* is exceptional in that it cannot be altered once it has been made. Nevertheless, this is the only respect in which Mālik regards *tadbīr* to be an anomaly

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[1]See above, pp. 184-188.

to other types of bequests. For, as Mālik indicates in his AMN precept on tadbīr, the execution of tadbīr after the master's death is done in the same manner as the execution of other types of bequests.[1]

5. AMN: Bequests to Set Free One's Share of a Jointly Owned Slave

> Mālik begins with a ḥadīth which states that whoever sets free his share of a jointly owned slave and has enough money to pay the slave's total price, will be required to pay each of his partners the value of their shares [so that the slave may go free]. The value of these shares must be determined fairly; each shareholder receives the portion due him; and the slave will be emancipated at the hands of the man who first set his portion of the slave free. (This means that that person will receive the right's of the slave's clientship [walā'] and, as a result, certain rights to inherit from the slave.) But if the person who frees his share of the slave does not have sufficient money, then only his share of the slave will be set free. Mālik states that it is the AMN regarding a jointly owned slave one of whose masters bequeathes that his share of the slave be freed upon that master's death that, upon the master's death, only his share of the slave will be set free and the remaining shares of the slave will not be freed against that master's estate, unless the master had stipulated that the remaining shares be freed against his estate, in which case as much of the slave would be set free as one-third of the master's estate would permit. The reason for this, Mālik explains, is because the entire estate of the master ceases to be his property upon his death and becomes that of his heirs, except for any specific bequests he has made, [which cannot exceed one-third the value of the estate]. Therefore, to emancipate the remaining shares of the slave from the master's estate would amount to freeing the slave from the property of the heirs, who--Mālik points out--had not initiated the matter and who would not receive any of the rights of clientship, which the master would have received. Mālik indicates that to free the slave at the expense of the heirs would be to cause them undue harm [ḍarar].[2]

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[1] Muwaṭṭa', 2:814. [2] Ibid., 2:772-773.

I was unable to find detailed information about the opinions of the early fuqahā' regarding the AMN precept in this example. I was able, however, to find information regarding the different opinions of early fuqahā' regarding the legal implications of the ḥadīth which Mālik cites at the beginning of the chapter, and I believe one can infer from that information some of the points of difference that must have existed regarding Mālik's AMN.

The Baṣran Successor Ibn Sīrīn,[1] for example, and Mālik's teacher Rabīᶜah are both said to have held unusual [shādhdh] opinions on this matter. Ibn Sīrīn is said to have held that whenever a person who owns a slave jointly frees his share of the slave, the remainder of the slave will be freed at the expense of the public treasury [bait al-māl].[2] Thus, for Ibn Sīrīn there would be no question of the slave's being freed at the expense of the master's heirs nor of the slave being freed from one-third of the master's estate. Rabīᶜah held, on the contrary, that it is invalid for a person to free his share of a slave without the consent of the other shareholders, because of the harm [ḍarar] which his action would bring to the other share-

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[1]MUḤAMMAD IBN SĪRĪN al-Baṣrī al-'Anṣārī (ca. 33-110/ca. 653-729) was a significant Baṣran Successor. He transmitted ḥadīth from many Companions. In addition to being known as a muḥaddith, Ibn Sīrīn was known as a faqīh, an ascetic, and a famed interpreter of dreams. Sezgin, 1:633.

[2]Ibn Rushd, (Istiqāmah), 2:362; az-Zurqānī, 5:6.

holders. Thus, Rabī^{c}ah would have wanted to add the stipulation to Mālik's AMN that the master must have this consent before his bequest to liberate his share of the slave will be valid. Furthermore, it is not clear whether or not Rabī^{c}ah held that the shareholder who sets free his share of the slave would still have to compensate the others after they had consented. It might be noted, however, that Ibn Rushd seems to doubt the authenticity of this report about Rabī^{c}ah. He uses the expression "qīla ^{c}an Rabī^{c}ah" [it is said about Rabī^{c}ah], which is often used to indicate the writer's doubt about the authenticity of the report.[1]

Al-'Awzā^{c}ī, Ibn 'Abī Lailā, 'Abū Yūsuf, ash-Shaibānī, and the majority of the Kūfans are said to have held that the slave becomes free on the day that the shareholder sets free his share of the slave. If that shareholder is unable financially to compensate the other shareholders, the slave will still be emancipated but will have to compensate the shareholders from his own earnings. Nevertheless, the rights of clientship go to the one who first freed his share of the slave. Ibn 'Abī Lailā and some others also held that the slave could require the shareholder who first set his share free to compensate the slave for his earnings which had gone to compensate the other shareholders, if that shareholder later became financially capable of doing

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[1]Ibn Rushd, (Istiqāmah), 2:360.

so.[1] Thus, these fuqahā' would have at least added the provision to Mālik's AMN that the slave would be declared completely free upon the death of the master and that the slave would compensate the other shareholders from his own earnings, if there were not sufficient funds within the master's estate. 'Abū Ḥanīfah is said to have held a somewhat similar position, although he held, unlike the others, that if the master who first freed his share of the slave had himself compensated the other shareholders from his own wealth, he could require the slave to exert himself and compensate the master for this compensation which the master had paid.[2]

The ultimate source of Mālik's AMN precept is not clear. It is cited in conjunction with a ḥadīth. Nevertheless, the AMN is not contained in the ḥadīth; rather the AMN is, from Mālik's point of view, a legal consequence of the precept contained in the ḥadīth. The relevant stipulation in the ḥadīth is that a shareholder who frees his share of a jointly owned slave will not be required to compensate the other shareholders if he lacks sufficient wealth to do so. (It might be noted that the Kūfans are reported to have argued that this stipulation was not part of the original ḥadīth but is, rather, a commentary of Nāfi^{c}--the transmitter of the ḥadīth--which then came to be regarded as part of the ḥadīth's original text.[3]) The AMN, of course, per-

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[1]Ibn Rushd, (Istiqāmah), 2:360. [2]Ibid. [3]Ibid., 2:361.

tains to a master who frees his share of a jointly owned slave as part of his bequest [waṣīyah]. Since, according to the Islamic law of bequests and inheritance, the entirety of one's estate goes upon one's death to the designated heirs, except for those parts of the estate which have been designated specifically as bequests, Mālik explains that, in effect, the master--no matter how wealthy he may have been--no longer possesses sufficient wealth at the time of the disposition of his bequest to compensate the other shareholders of the slave.

It is possible that this implication of the AMN was part of the non-textual source of Madīnan ᶜamal naqlī and that it was made clear when the laws of bequests and the laws pertaining to the emancipation of slaves were set down. It is also possible that the AMN was deduced by later Madīnan fuqahā' in the same manner that Mālik has set forth the reasoning behind it, in which case the AMN would be the result of ijtihād, although it would be impossible from the information Mālik gives to date that ijtihād. Whatever the ultimate source of this AMN precept, therefore, what is most apparent from the text of the Muwaṭṭa' is the fact that Mālik is not primarily concerned with communicating the source of this ᶜamal but, rather, with indicating that it is supported by Madīnan ijtimāᶜ, and the Madīnan ijtimāᶜ in this case, as indicated above, may not include the agreement of the prominent Madīnan Successor and teacher of Mālik, Rabīᶜah.

The AMN precept in this example is the direct consequence of two accepted Madīnan precepts of law, the precept pertaining to the emancipation of jointly owned slaves and the precept pertaining to the disposition of bequests. There is a similar AMN precept later in the Muwaṭṭa' which sets forth other consequences of the precept regarding the emancipation of jointly owned slaves.[1] Thus, although these two AMN precepts are not analogical, properly speaking--for they involve no analogies--nevertheless, they are consistent with other well-established precepts and do not have the exceptional and anomalous character of Mālik's sunnah precepts.

6. Qasāmah[2]

> Mālik cites two ḥadīth pertaining to qasāmah. He then states that it is the AMN and that which he has heard [transmitted] from those who are acceptable to him ["mimman 'arḍā"] regarding the qasāmah and that upon which has been the ijtimāᶜ of the 'imām's of early and of recent times that the plaintiffs take the first oaths in qasāmah and that qasāmah is required by only two circumstances: either the victim says before dying that a certain person has killed him or the plaintiffs bring circumstantial evidence ["lawth min bayyinah"] against the defendant, even if it is not conclusive ["qāṭiᶜah"]. Mālik says that it is the S-XN and that in accordance with which the ᶜamal of the people has always been ["wa 'l-ladhī lam yazal ᶜalaihi ᶜamal an-nās"] that in both

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[1]Muwaṭṭa', 2:789. This precept pertains to the contract of mukātabah, in which the masters makes an agreement that the slave will work to earn his freedom; the AMN is that if one of the shareholders of a jointly owned slave makes a contract of mukātabah regarding his share of the slave, then all other shareholders will also be obliged to make such a contract with the slave. Again, Mālik explains the reasoning behind the precept.

[2]Qasāmah: A method--which was a pre-Islamic custom originally--according to which guilt is established in cases

cases of murder and involuntary manslaughter it is the plaintiffs who take the first oaths in qasāmah. Mālik points out that in the ḥadīth cited at the beginning of the chapter the Prophet is reported to have let the plaintiffs take the first oaths.[1]

There are two points in this AMN precept, each of which constituted a point of difference among the early fuqahā'. The first point is that the plaintiffs take the first oaths in qasāmah; the S-XN, by the way, pertains exclusively to this point. The second point pertains to the nature of the evidence required for qasāmah. It might be noted that Mālik does not include in this AMN precept the question of whether or not qasāmah is a valid basis upon which to inflict capital punishment. ᶜUmar ibn al-Khaṭṭāb and others, for example, are said to have held that qasāmah could only be used for awarding diyah's but not for capital punishment. Similarly, ᶜUmar ibn ᶜAbd-al-ᶜAzīz is said to have been against the use of qasāmah for taking life.[2]

The S-XN and the first point of the AMN constituted a point of difference between Mālik and 'Abū Ḥanīfah, who like many Kūfans and Baṣrans held that it was the defendants and not the plaintiffs who are to be offerred the opportunity to take the first oaths in qasāmah. If they take those oaths and swear that they are not guilty, they will be ex-

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of murder and liability in cases of involuntary manslaughter in the absence of conclusive evidence but when there is sufficient circumstantial evidence in the hands of the plaintiff against the defendant. Either party is required to take fifty oaths supporting his claim.

[1]Muwaṭṭa', 2:877-879. [2]Ibn Rushd, (Istiqāmah), 2:419,421.

empt from liability and no further claims may be brought against them in the absence of more conclusive evidence. This position is said to have been based on the consideration that in the Islamic law of oaths it is the plaintiff who is required to produce sufficient evidence to support his claim, while the defendant, in the absence of such evidence, is permitted to clear himself by taking an oath to the contrary. Thus, 'Abū Ḥanīfah regarded qasāmah to be analogous to other procedures in Islamic law involving the taking of oaths.[1]

Regarding the second point of the AMN, 'Abū Ḥanīfah held that the statement of a dying person that a certain person was responsible for his murder was not sufficient evidence to warrant the use of qasāmah against the accused. Apparently, many of the non-Madīnan fuqahā' held this same opinion; Ibn Rushd states, for example, that of the non-Madīnan fuqahā' only al-Laith ibn Sa^{c}d took Mālik's position in this matter.[2]

According to Ibn Rushd, there were also a few early fuqahā' who opposed qasāmah altogether. They are said to have held that it was an invalid pre-Islamic custom and that there was not sufficient evidence to prove that the Prophet had authorized it, noting that in the ḥadīth on qasāmah, such

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[1]Al-Bājī, 7:55; Ibn Rushd, (Istiqāmah), 2:421; az-Zurqānī, 5:187.

[2]Ibn Rushd, (Istiqāmah), 2:423; al-Bājī, 7:52, 56.

as the ḥadīth which Mālik cites in the Muwaṭṭa', the Prophet never administered the qasāmah. He offerred the option of qasāmah to some of the Companions one of whose close relatives had been murdered under suspicious circumstances, but these Companions turned down the option of qasāmah, because they did not want to take oaths regarding matters of which they had no certain knowledge. These opponents of qasāmah are said to have argued further that the Prophet had known that his Companions would refuse to take the option of qasāmah because of the Islamic principles which they had been taught and that the Prophet made the offer to them in order to demonstrate by their refusal the superiority of Islamic over pre-Islamic ethics.[1]

The opponents of qasāmah have also pointed out, according to Ibn Rushd, that qasāmah is contrary to three well-established precepts of Islamic law. The first, which is referred to in the above paragraph, is that it is not permissible that one take an oath regarding a matter of which one does not have certain knowledge. The second is that in the absence of conclusive evidence, oaths are used in Islamic law in money matters and not in matters that pertain to capital punishment.[2] And the third is that in all other precepts pertaining to the taking of oaths it is the defendants and not the plaintiffs who are offerred the oppor-

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[1]Ibn Rushd, (Istiqāmah), 2:419-420.

[2]See above, pp. 141-143.

tunity to take the oaths first and thereby clear themselves.[1]

Mālik's qasāmah precept, therefore, is contrary to analogy with other precepts of Islamic law. In that regard, his use of the sunnah term S-XN in this example is similar to his usage of sunnah terms elsewhere in the Muwaṭṭa'.[2] Ibn Rushd states that Mālik regarded the qasāmah to be a unique sunnah which like many other types of sunnah drew exception to other general precepts of law. He continues to state that Mālik held that the reason for qasāmah was the need to protect life.[3]

Both of Ibn Rushd's statements are supported by the text of the Muwaṭṭa'. In his defense of the precept of qasāmah, Mālik supports his contentions that the plaintiffs must be the first to take the oaths and that the testimony of a dying man about who killed him is sufficient evidence to warrant the use of qasāmah against the accused. In so doing, Mālik emphasizes the principle of maṣlaḥah and contrasts qasāmah with precepts of law regarding the use of oaths in other matters:

> The difference between qasāmah in cases of murder and between oaths regarding [money] rights is that a person who loans money to another takes steps to establish evidence of his right against him [to whom he makes the loan]. But when a person desires to kill another, he does not do it in the midst of a large group of people. Rather, he seeks out a secluded place. . . . So if qa-

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[1]Ibn Rushd, (Istiqāmah), 2:419. [2]See above, pp.576-582.

[3]Ibn Rushd, (Istiqāmah), 2:420.

> sāmah were used only when there were well-established evidence or if one were to follow in it the procedure which is followed regarding [money] rights, there would be great loss of life ["halakat ad-dimā'"]. People would dare to take life once they knew what the verdict in qasāmah would be. But qasāmah has been set down for the guardians of the victim [wulāt ad-dam], who take the first oaths in it, in order to make people refrain from the shedding of blood and in order that the murderer beware lest he be apprehended in matters like this by his victim's [last] words.[1]

Thus, Mālik has defended the precept of qasāmah against the contentions which other fuqahā' are reported to have had against it, and he has sought to justify the anomalous nature of qasāmah by reference to the principle of maṣlaḥah, which 'Abū Zahrah regards as being the most central concern of Mālikī legal theory.[2]

Mālik regards qasāmah to be of the category of what later theorists called "ᶜamal naqlī", which is indicated by his citation of the two ḥadīth at the beginning of the chapter. According to those ḥadīth the Prophet did not complete his administration of qasāmah. The ḥadīth report, nevertheless, that the Prophet offerred the oaths first to the plaintiffs, who, as already mentioned, declined to take them and were not satisfied that qasāmah be implemented in their case. Thus, after his statement of the S-XN and his reference to the continuous ᶜamal of the people, Mālik points out that the procedure of beginning with the plaintiffs is what the Prophet is reported to have done.

The source of the other part of the AMN precept re-

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[1]Muwaṭṭa', 2:880. [2]See above, pp. 269, 205, 83.

garding what evidence is required for qasāmah is not as clear. It is likely, however, that it is the product of Madīnan ijtihād, since, according to Ibn Rushd, the ḥadīth Mālik cites report the only instance of qasāmah which is known to have taken place during the Prophet's career.[1] The victim in that case had been found dead; thus, it did not provide a precedent for Mālik's stipulation that the last words of the victim constitute sufficient evidence for qasāmah.

It appears to me that the AMN in this example is an inclusive term[2] taking in the S-XN, while the S-XN excludes that part of the AMN which pertains to evidence. It is worthy of note, I believe, that Mālik refers to the ijtimā^{c} of the 'imām's of the past and present in reference to the AMN; perhaps it is from the ^{c}amal of these 'imām's--instead of ^{c}amal naqlī--that the Madīnans have taken these stipulations about evidence. Similarly, in an earlier example it appears that Mālik's AMN includes an A-XN, while the A-XN omits from its wording an important point of difference between some of the early fuqahā'.[3] There is another example of an AMN which includes a sunnah term in Mālik's chapter on the laws of inheritance. The term Mālik cites is AMN: S-XN: x̄dIb ["al-'amr al-mujtama^{c} ^{c}alaihi ^{c}indanā wa 's-sunnah al-latī lā 'khtilāf fīhā wa 'l-ladhī 'adraktu

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[1]See Ibn Rushd, (Istiqāmah), 2:419-420.

[2]See discussion of inclusive and exclusive terms above, pp. 523-529.

[3]See above, p.707.

ᶜalaihi 'ahl al-ᶜilm bi-baladinā"]. Part of that precept--namely, the stipulation that a Muslim may not inherit a non-Muslim relative--is supported by a ḥadīth which Mālik cites and other clear indications that it is part of the Prophetic sunnah. Another part of the precept, however--namely, that a Muslim also may not inherit a non-Muslim freedman client [mawlā]--is not explicitly indicated by the sunnah. It is noteworthy that in this example Mālik supports this additional part of the AMN precept which is not part of the explicit sunnah by the ᶜamal of earlier 'imām's: ᶜUmar ibn al-Khaṭṭāb and ᶜUmar ibn ᶜAbd-al-ᶜAzīz.[1]

Mālik cites several 'amr precepts elsewhere in the Muwaṭṭa' which set forth various particulars about the ᶜamal of qasāmah; each of these appears to be a product of ijtihād. It is the AN, for example, that finding a body in a village, near a house, or in some similar location is not sufficient evidence to bring qasāmah against the inhabitants of such places, because the body might have been placed there by others.[2] It is the AN that at least two plaintiffs are required for qasāmah in cases of murder and that they repeat their oaths fifty times; it is reported that Saᶜīd ibn al-Musayyab and az-Zuhrī disagreed with this precept and regarded it to be an innovation of Muᶜāwiyah.[3] There is another

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[1]Muwaṭṭa', 2:519-520. [2]Ibid., 2:871.

[3]Ibid., 2:881 and ar-Rasīnī, p. 410.

AN precept pertaining to qasāmah in the case of slaves and an A-XN which excludes women from taking oaths in qasāmah when they pertain to cases of murder, as opposed to involuntary manslaughter.[1]

Finally, it should be pointed out that Mālik transmits a report in the Muwaṭṭa' according to which ᶜUmar ibn al-Khaṭṭāb once attempted to use qasāmah in an unusual case in which a horse belonging to a certain tribesman and which had been made to stampede crushed the finger of another tribesman, who died thereafter. Neither party would take the oaths of qasāmah in that case of involuntary manslaughter, however. Apparently, the plaintiffs were not sure that the man from their tribe had died as a result of the incident, nor were the defendants sure that he had not. ᶜUmar therefore made an independent settlement between them.[2] Nevertheless, the significant point in this report in so far as qasāmah is concerned is that it reports that ᶜUmar first offerred the oaths to the defendants--in contrast to Mālik's S-XN, which he has also described as being the ijtimāᶜ of the 'imām's of early and later times. Mālik cites his negative ᶜamal term, Al-X̄, after this report,[3] and he refers back to it later as an indication that people are held liable for the injuries which the animals they drive, ride, or herd

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[1]Muwaṭṭa', 2:883, 881. [2]See al-Bājī, 7:73.

[3]Muwaṭṭa', 2:851.

cause to others.[1]

What is interesting about this report, of course, is the fact that it is in conformity with the Ḥanafī position regarding qasāmah, although it is a report of an isolated legal judgment which would make it conjectural according to Mālikī legal theory.[2] Mālik might have accounted for this discrepancy in the report in several ways, such as its having been a mistake of the transmitter or its having been an alteration which ᶜUmar ibn al-Khaṭṭāb made on the basis of his personal ijtihād according to the circumstances of the case. Nevertheless, one is reminded of the statement of Ibn al-Qāsim in the Mudawwanah in a similar situation when faced with a report about something ᶜĀ'ishah is said to have done which would have been contrary to Mādīnan ᶜamal:

> We do not know what the [correct] interpretation [tafsīr] of it is but believe that she appointed someone else to act as her representative . . . . This has come down [to us], and if this ḥadīth had been accompanied by ᶜamal such that that [practice] would have reached those whom we met during our lifetimes and from whom we received [our knowledge] and those whom they had met during their lifetimes, it would indeed be correct [ḥaqq] to follow it. But it is only like other ḥadīth that have not been accompanied by ᶜamal. . . .
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> . . . . . .
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> [Ḥadīth such as these] remained [in the state of being] neither rejected as fabricated or put into practice. . . .[3]

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[1]Muwaṭṭa', 2:869. [2]See above, pp. 180-181.

[3]See above, pp. 188-195.

Conclusions

I have focused exclusively in this analysis on the term AMN and have touched on other terms like A-XN only coincidentally. The AMN's which I have surveyed in this chapter show the characteristic pattern of Madīnan-Kūfan differences of opinion, although again other fuqahā' are also occasionally involved in the disagreement. Each of these AMN's except for the first constitutes a point of difference on at least some point between Mālik and 'Abū Ḥanīfah. (Although 'Abū Ḥanīfah is reported to have agreed with Mālik regarding the first AMN precept, it is said, nevertheless, to have constituted a point of difference between Mālik and the Kūfan Sufyān ath-Thawrī, who is also reported to have been in disagreement with Mālik's second AMN.[1]) Other prominent non-Madīnan fuqahā' who are reported to have disagreed with some of the AMN precepts of this chapter are al-Ḥasan al-Baṣrī,[2] the Baṣran Ibn Sīrīn,[3] al-Laith ibn Sa^{c}d,[4] al-'Awzā^{c}ī,[5] the Makkans ^{c}Aṭā' ibn 'Abī Rabāḥ and Mujāhid,[6] and the Kūfans Ibn 'Abī Lailā, 'Abū Yūsuf, and ash-Shaibānī.[7]

In four of the AMN's surveyed in this chapter there are possibilities of at least one prominent Madīnan faqīh having disagreed. The Madīnan Companion Jābir ibn ^{c}Abd-Allāh is reported to have disagreed with the first AMN.[8] There

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[1]See above, pp. 693, 696 [2]Above, p. 693. [3]Above, p. 709.
[4]Above, pp. 701-702. [5]Above, pp. 705, 709.
[6]Above, p. 693 [7]Above, p. 709. [8]Above, p. 695.

is a possibility that Mālik's teacher Rabīᶜah disagreed with the fifth AMN; Rabīᶜah's opinion in that matter is said to have been unusual and unique [shādhdh], and, as mentioned, Ibn Rushd seems to doubt the accuracy of the report.[1] Mālik's prominent student Ibn Kinānah is reported to have disagreed with the third AMN precept, although it is not known whether he did so during Mālik's lifetime or afterward.[2] Finally, al-Qāsim ibn Muḥammad, who was one of the so-called Seven Fuqahā' of Madīnah, may have disagreed with the second AMN precept; in that case, however, not enough is known about the full scope of al-Qāsim's opinion to determine whether or not he was actually in disagreement with Mālik's AMN.[3] Nevertheless, if these examples did in fact constitute disagreements among Madīnan fuqahā' during or prior to Mālik's life, it would be an indication, I believe, that the ijtimāᶜ which Mālik is referring to in his AMN is a majority and not a total consensus of the Madīnan fuqahā'. Such a position is also supported by ash-Shāfiᶜī's contention that there were differences of opinion in Madīnah regarding Mālik's AMN's and his AN's.[4]

The possibility of differences of opinion among Madīnan fuqahā' regarding Mālik's AMN's is contrary to the definition which Ibn 'Abī 'Uwais is reported to have trans-

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[1]See above, pp. 705-710. [2]Above, pp. 701-702.

[3]Above, pp. 696 -697. [4]See above, pp. 343-347.

mitted from Mālik. According to him, Mālik said:

> That for which [I have used] "al-'amr al-mujtama^{c} ^{c}alaihi" constitutes opinions of the people of learning in fiqh and knowledge upon which ijtimā^{c} has been reached without their having differed in them ["mā 'jtumi^{c}a ^{c}alaihi min qawl 'ahl al-fiqh wa 'l-^{c}ilm, lam yakhtalifū fīhi"].[1]

There would apparently be no difference, according to this definition, between AMN and the other 'amr terms which stand for Madīnan ijtimā^{c} but state specifically that there have been no differences of opinion among the Madīnans on the matter, i.e., AMN-X and A-XN. It is possible, as I mentioned earlier, that this specification that there was no disagreement among Madīnan fuqahā' regarding Mālik's AMN precepts was an interpolation of later Mālikīs who sought to lend greater authority to AMN than it was likely to have if conceived of as a majority consensus.[2] The concept of a majority consensus or even a consensus of the preponderant majority--although a very workable concept--would likely have appeared very tentative in the light of ash-Shāfi^{c}ī's emphasis upon 'ijmā^{c} as constituting a total consensus of the entire 'ummah.[3]

The source of the AMN precepts I have studied in this chapter is often unclear from the text of the Muwaṭṭa'. Two of them appear to pertain to the category of ^{c}amal naqlī.[4] It is possible that each of them contains at least some ele-

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[1]See above, p. 539. [2]Above, p. 543.

[3]See above, pp. 195-204. [4]Above, pp. 705-706, 718-720.

ment of ijtihād. The AMN on qasāmah, for example, while containing a point which Mālik refers to as S-XN, also contains a second point regarding the evidence which is required in qasāmah, which would appear to have been the result of ijtihād, since the Prophet is reported to have turned to qasāmah only once during his career and, thus, it is not likely that there would have been precedents in his sunnah which would cover some of these stipulations on evidence. As noted, Mālik refers to the ᶜamal of the 'imām's of the past and the present in conjunction with the AMN on qasāmah, and I believe this may be an indication that those parts of qasāmah which are not derived from ᶜamal naqlī are the products of the ijtihād and ᶜamal of these 'imām's. Similarly, in another AMN on inheritance, part of the precept appears to be taken from ᶜamal naqlī and is referred to by the term S-XN, while another part of the precept would appear to have been taken from the ᶜamal of 'imām's like ᶜUmar ibn al-Khaṭṭāb and ᶜUmar ibn ᶜAbd-al-ᶜAzīz.[1]

The presence of elements of ijtihād in Mālik's AMN is supported by the report from Ibn 'Abī 'Uwais. For Mālik refers to AMN in that definition as being constituted by opinions [qawl] of the Madīnan fuqahā'. Nevertheless, the term AMN is not restricted to matters of ijtihād exclusively. According to my analysis of Mālik's terminology, AMN

[1]See above, pp. 719-720.

is an "inclusive" term.[1] It can include Mālik's sunnah terms and, hence, ᶜamal naqlī--as in Mālik's AMN on qasāmah and the AMN on inheritance, referred to above. It can also include terms like A-XN, as indicated in the fourth AMN precept of this chapter.[2] But the sunnah terms and the term A-XN in the above example do not include the full scope of the AMN. Rather, in each of these examples the sunnah term or the other 'amr term is applied to only a limited part of the AMN precept. In the fourth AMN precept in this chapter, for example, 'Abū Ḥanīfah would agree with Mālik's A-XN, while he would not have been able to agree with the wording of the more inclusive AMN.[3]

The origin of the ijtihād in most of the AMN precepts discussed in this chapter cannot be established on the basis of the information which Mālik gives in the Muwaṭṭa'. In some cases, as for example in the case of the AMN on inheritance referred to above, it is clear that the ijtihād would go back as least as far as ᶜUmar ibn al-Khaṭṭāb, because it is reported to have been part of his ᶜamal. In other cases, the ijtihād is so closely tied to well-established sunnah precepts--such as the laws regarding bequests--that it would seem probable that the ijtihād must have gone back to the Companions. Nevertheless, it does not appear likely from

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[1]See above, pp. 523-529. [2]Above, p.707.

[3]Ibid.

my study of Mālik's AMN precepts that he was concerned with communicating a distinction between what later legal theorists refer to as "ᶜamal qadīm"--ancient ᶜamal, i.e., going back to the ijtihād of the Companions--and "ᶜamal muta'akhkhir"--later ᶜamal, i.e., going back to the ijtihād of the Madīnan Successors.[1] On the contrary, whatever the origin of the ijtihād in Mālik's AMN's, his primary concern is apparently that of indicating whether that ijtihād was supported by the ijtimāᶜ of the Madīnan fuqahā'.

Another important characteristic of the AMN precepts studied in this chapter is the legal reasoning which Mālik uses to explain or defend them. Mālik accounts for the first and third AMN's by analogical reasoning.[2] His analogical reasoning in these examples, as in earlier examples from the Muwaṭṭa', is an illustration of analogical reasoning based on well-established precepts of law instead of specific legal texts, which I regard to be a fundamental characteristic of Mālikī and Ḥanafī qiyās and an important difference between their conception of qiyās and that of ash-Shāfiᶜī.[3] Furthermore, these AMN's are analogous to other precepts of law and are not of an anomalous nature, in contrast to the precepts of Mālik's sunnah terms.[4]

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[1]See above, pp. 415-419.

[2]Above, pp. 693-695, 700, 703. [3]Above, pp. 216-234.

[4]See above, 576-582.

The fourth and fifth AMN's do not contain analogical reasoning but are akin, nevertheless, to those AMN's which contain analogies. In these examples, Mālik accounts for the AMN precepts by reasoning directly from related precepts of law, attempting to demonstrate that the AMN precepts are the necessary consequences of those related precepts.[1] Although not the products of analogy, these AMN precepts are, nevertheless, contrary to Mālik's sunnah precepts, for these AMN's are in keeping with the implications of other established precepts and are not of an anomalous nature.

The second and sixth AMN's are exceptions to general rules. The second, which permits the use of the testimony of youths under certain circumstances, is regarded by Ibn Rushd and al-Bājī to be based on the consideration of maṣlaḥah.[2] It draws exception to the general precept of testimony not by virtue of the explicit textual authority of the Prophetic sunnah but, rather, on the basis of ijtihād based on the principle of al-maṣāliḥ al-mursalah, one of the chief functions of which is to draw such exceptions.[3] The precept of qasāmah, as pointed out, is contrary to at least three well-established precepts of Islamic law, and some fuqahā' are reported to have opposed qasāmah by virtue of that reason. Mālik defends the validity of the anomalous nature

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[1]See above, pp. 707-708, 713. [2]Above, pp. 699-700.
[3]Above, pp. 268-275.

of qasāmah, however, by reference to the principle of maṣlaḥah and responds to the objections of those who are reported to have disagreed with the Madīnan conception of qasāmah.[1]

[1]See above, pp. 716-718.

CHAPTER XI

AL-'AMR ᶜINDANĀ:

AN

General Observations

Al-'Amr ᶜindanā [AN; the 'amr among us; the 'amr which we follow, which we regard to be correct] is the most common term in the Muwaṭṭa'. It occurs 104 times by itself and 13 times in various combinations or with slight modifications, none of which occurs more than once. Thus, in all, AN occurs 117 times, which makes it almost two and a half times as numerous as the second most common term, AMN, which occurs 43 times by itself, 6 times in various combinations or with slight modifications, and 49 times in all.[1]

AN, furthermore, is the most evenly distributed term in the Muwaṭṭa'. It occurs in chapters that pertain to social transactions and those which pertain to religious rituals and acts of worship. It occurs in chapters that contain numerous other types of terms, and it occurs in chapters which contain no other terms at all.[2]

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[1]See above, p. 692, and see appendix 2 for the index of AN's.

[2]See appendix 2, table 2 on the distribution of terms according to chapters.

AN and ᶜAmal

According to Mālik's statement as transmitted by his nephew Ibn 'Abī 'Uwais, AN precepts are part of the ᶜamal of Madīnah. Mālik is reported to have said:

> That for which I have said "al-'amr ᶜindanā" is the ᶜamal which the people among us here [an-nās ᶜindanā] have been following. Rulings are handed down in accordance with it ["bihī jarat al-'aḥkām"], and both those who are ignorant and knowledgeable know what it is.[1]

In this statement Mālik makes no mention of AN being supported by Madīnan ijtimāᶜ, and, as will be seen in some of the AN precepts to be analyzed in this chapter, there is sometimes evidence in the Muwaṭṭa' of significant differences of opinion among the Madīnan fuqahā' regarding the validity of AN precepts.[2] Furthermore, according to this report, Mālik draws a connection between AN and the Madīnan judiciary. As suggested earlier, in matters that came under the jurisdiction of the Madīnan courts, it was probably the authority of the judiciary which created unified ᶜamal in Madīnah despite different opinions among the fuqahā'.[3] The same would apply to matters of law that came under different types of executive authority, such as the office of the muḥtasib [the overseer of the marketplace and public morals] and the office of the 'amīr. As mentioned earlier in the discussion of Mālik's ᶜamal chapters, the prominent Madīnan faqīh Saᶜīd

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[1]See above, pp. 539-540.

[2]See below, pp. 731-760.

[3]See above, pp. 538-544.

ibn al-Musayyab is reported to have disagreed with the Madīnan ᶜamal, which Mālik describes as sunnah, that martyrs who are killed on the battlefield are to be buried as they are without their bodies being washed, shrouded, or prayed over. Although this precept would not have come under the jurisdiction of the Madīnan judiciary, the execution of it, nevertheless, would have come under the executive authority of the 'amīr or the commander of the army.[1]

Az-Zuhrī is quoted in the Mudawwanah as referring to an important precept regarding the rights of the wife in marriage as the AN; in that citation, az-Zuhrī repeats twice that this AN constitutes the precept in accordance with which the judges hand down their rulings.[2] Many AN precepts in the Muwaṭṭa', however, pertain to matters of Islamic law which did not come under the jurisdiction of the judiciary or of other types of executive authority--such as, for example, those AN's which pertain to voluntary acts of worship. In the presence of differences of opinion among the Madīnan fuqahā' on matters of that sort, whatever uniformity of ᶜamal there was would probably have been a function of the prestige and consequent social influence of those Madīnan fuqahā' who subscribed to the AN. ᶜAmal in such cases may often not have been uniform, however, but mixed--some people following the preference of certain fuqahā', while others fol-

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[1]See above, pp. 666-667. [2]Mudawwanah, 2:195 (24).

lowed the preference of other fuqahā'. In the example of the ᶜamal in masḥ, for instance, there were apparently two types of Madīnan ᶜamal in the matter; Mālik regards both of them to be ᶜamal but indicates which of them he prefers.[1]

It should be pointed out, however, that there are also examples in the Muwaṭṭa' of mixed ᶜamal which came under the jurisdiction of the judiciary. Regarding the question of what the length should be of the installment periods over which indemnities [diyāt] are to be paid, Mālik indicates that there were two ᶜamal's in Madīnah. One of them set the period at three years, which Mālik states is the position he prefers; the other set the period at four years.[2] Thus, some diversity in ᶜamal was also part of the Madīnan judicial tradition.

AN's Pertaining to Social Matters

1. AN: No Fixed Indemnity for Penetrating Wounds to the Body

> Mālik states that Saᶜīd ibn al-Musayyab held that the indemnity for any wound which penetrates the flesh of a limb of the body is fixed at one-third the indemnity for the destruction of that limb. Mālik then states that az-Zuhrī did not hold this opinion, and Mālik continues to say that there is no AMN in the matter and that it is his opinion that the amount of such indemnities should be left up to the ijtihād of the 'imām. It is the AN, Mālik states, that the ma'mūmah, munaqqalah, and mūḍiḥah wounds[3] pertain only to wounds that

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[1]See above, pp. 654-655. [2]Above, pp. 676-677.

[3]These are the terms used for three types of wounds which penetrate the face or skull. Mālik discusses them and the indemnities which have been fixed for them just prior

are inflicted upon the head or face. Similar wounds inflicted upon limbs of the body are matters of ijtihād.[1]

I have found no information regarding what the opinions of the non-Madīnan fuqahā' were regarding Mālik's AN. As Mālik clearly indicates, however, the prominent Madīnan faqīh Sa^c^īd ibn al-Musayyab did not agree with this AN precept. Mālik indicates in this example the difference between his conception of AMN and AN. He and az-Zuhrī disagree with Sa^c^īd ibn al-Musayyab, and Mālik states that there is no AMN in the matter. Mālik then sets forth his own opinion, which is contrary to Sa^c^īd ibn al-Musayyab's, and he calls it an AN.

Mālik has been discussing the indemnities for the ma'mūmah, munaqqalah, and mūḍiḥah just prior to his presentation of Sa^c^īd ibn al-Musayyab's opinion. Each of these wounds is a penetrating [nāfidhah] wound, and each of them has a fixed indemnity which the Prophet set down in a letter he dispatched to one of his regional governors; Mālik also refers to this letter just prior to his presentation of Ibn al-Musayyab's opinion. Al-Bājī states that semantically the words "ma'mūmah," "munaqqalah," and "mūḍiḥah" can be applied to wounds that penetrate any part of the body; Mā-

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to his discussion of this AN. The ma'mūmah is, according to Mālik, a wound which lays bare the dura mater or the brain. The munaqqalah shatters the small bones next to the cranium but does not penetrate to the brain. The mūḍiḥah lays bare the skull bone. See Muwaṭṭa', 2:858-859.

[1]Muwaṭṭa', 2:859.

lik, however, restricts the application of these words to head and facial wounds, as indicated by the wording of the AN and even more specifically by the discussion which precedes it.[1] Sa^{c}īd ibn al-Musayyab, as az-Zurqānī indicates, apparently did not agree to this semantic restriction of the words.[2]

I believe Mālik would have regarded the ^{c}amal of this AN to be of the category of what later legal theorists termed to be ^{c}amal naqlī, ^{c}amal going back to the time of the Prophet. Mālik held that the indemnities fixed for wounds like the ma'mūmah, munaqqalah, mūḍiḥah, and so forth had been set by the Prophet, and, as mentioned, he refers to a letter which the Prophet had dispatched to one of his governors setting forth what the indemnities for these wounds should be. Thus, Mālik must have regarded the Madīnan ^{c}amal which drew an exception between these types of penetrating head and facial wounds and penetrating wounds to the body as going back to the time of the Prophet. Mālik probably would have regarded the absence of fixed indemnities in such matters and the ^{c}amal that they be left up to the judgment [ijtihād] of the 'imām as going back to the Prophet's willful omission [tark].[3] In the discussion preceding the AN, for example, Mālik defends a position he has taken that there are no indemnities for head or facial wounds that are less serious than the mūḍiḥah, which lays bare the skull bone. Mālik reasons that the

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[1]Al-Bājī, 7:87. [2]Az-Zurqānī, 5:152.

[3]See above, pp. 410-415.

mūḍiḥah is the least serious head and facial wound for which the Prophet has fixed an indemnity in the letter dispatched to his governor. Mālik notes that, in addition to this, none of the 'imām's of the past or of present times have awarded indemnities for head and facial wounds less serious than the mūḍiḥah. Thus, Mālik is apparently reasoning that the ᶜamal of not awarding indemnities for such wounds goes back to the tark of the Prophet.

Finally, it should be pointed out that the awarding of indemnities was a matter which came under the jurisdiction of the judiciary, as indicated by Mālik's several references in this chapter to the ᶜamal and ijtihād of the 'imām's.

2. AN: The Indemnity for Teeth that Are Knocked Out

> Mālik cites a report according to which Marwān ibn al-Ḥakam sent a messenger to the Companion Ibn ᶜAbbās to ask him what the indemnity was for a molar tooth that has been knocked out. Ibn ᶜAbbās informs the messenger that it is five camels. Later Marwān sends his messenger back to Ibn ᶜAbbās to ask him why he has set the indemnity for a back tooth at the same amount which is given for a front tooth. Ibn ᶜAbbās answers, "Why have you not compared it to the fingers? The indemnity of each of them is the same." Mālik cites another report which states that ᶜUrwah ibn az-Zubair considered the indemnity of all teeth to be equal. Mālik then states that it is the AN that the indemnity of all teeth--front teeth and back teeth--is equal. Mālik states that this is because the Prophet has said, "Five camels for a tooth," and a molar is one of the teeth; none of them is regarded to be worth more than the others.[1]

There is said to have been complete consensus that the

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[1]Muwaṭṭa', 2:862.

indemnity for front teeth which are knocked out had been set at five camels.[1] It is clear from the text of the Muwaṭṭa' that Marwān ibn al-Ḥakam, who had doubts about whether or not the indemnity of back teeth should be equal to the indemnity of front teeth, recognized that the indemnity of five camels was what had been set for front teeth. In the chapter preceding Mālik's AN, he cites reports that indicate that there were differences of opinion among the Companions and Successors regarding what the indemnities for back teeth ought to be. He cites an 'athar according to which ᶜUmar ibn al-Khaṭṭāb awarded an indemnity of only one male camel [jamal] for a molar, while Muᶜāwiyah is reported to have awarded five--the same indemnity which Ibn ᶜAbbās held to be correct. Mālik cites another report according to which the prominent Madīnan Successor Saᶜīd ibn al-Musayyab comments on these differences between the opinions of ᶜUmar and Muᶜāwiyah and states that the indemnity is low in ᶜUmar's judgment and high in Muᶜāwiyah's. Saᶜīd ibn al-Musayyab states that if he were to rule in the matter, he would award two camels, which would be somewhere in between. Ibn al-Musayyab concludes by saying, ". . . And every mujtahid is given a reward" ["wa kullu mujtahid ma'jūr"].[2]

The majority of the fuqahā', including 'Abū Ḥanīfah, are said to have agreed with the precept of Mālik's AN.

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[1]Ibn Rushd, (Istiqāmah), 2:416. [2]Muwaṭṭa', 2:861.

ᶜUmar ibn ᶜAbd-al-ᶜAzīz, however, is said to have preferred the position of Saᶜīd ibn al-Musayyab.[1]

Mālik cites this AN in an ᶜamal Chapter, while citing the reports of the contrary opinions of ᶜUmar ibn al-Khaṭṭāb and Saᶜīd ibn al-Musayyab in a chapter which immediately precedes it. Thus, it is apparent from the text of the Muwaṭṭa' that this AN was the ᶜamal of Madīnah. Mālik regards this AN as being supported by the ḥadīth which he cites at the end of the chapter, the ẓāhir [apparent, obvious] meaning of which is that the indemnity for all teeth had been fixed at five camels. Al-Bājī regards the wording of the ḥadīth, however, to be of conjectural meaning. (One is reminded in that regard of the contention in Mālikī legal theory that ẓāhir statements are held to be of conjectural meaning.[2]) One might also interpret the ḥadīth as an understood reference to some of the teeth--such as, for example, the front teeth, on the indemnity of which all agree--as opposed to all the teeth, including the back teeth, the loss of which would not effect one's appearance.[3] Saᶜīd ibn al-Musayyab, according to the report which Mālik cites, certainly regarded the indemnity of back teeth to be a matter of ijtihād.

Mālik supports this AN precept in addition to citing the ḥadīth by indicating that it is ᶜamal and supported by

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[1]Al-Bājī, 7:93; az-Zurqānī, 5:156.

[2]See above, pp. 146-148. [3]See al-Bājī, 7:94.

Ibn ᶜAbbās and ᶜUrwah ibn az-Zubair and by setting forth the reasoning of Ibn ᶜAbbās. It is noteworthy that the analogy which Ibn ᶜAbbās is reported to have used is one that is based on precepts of law. He contends that the precept that the indemnity of all teeth is equal is analogous to the precept that the indemnity of each of the fingers is equal, although, Ibn ᶜAbbās implies, the utilities of each of the fingers--like each of the teeth--are not equal. By reference to ᶜamal and the reasoning of Ibn ᶜAbbās Mālik indicates that it is the ẓāhir meaning of the ḥadīth which is the intended meaning.

The ᶜamal of this AN would appear to lie somewhere between ᶜamal naqlī and ᶜamal qadīm. Mālik obviously regards it to be implicit in a statement attributed to the Prophet. But, on the other hand, it could not have been a well-known ᶜamal during the time of the Prophet, if such prominent persons as ᶜUmar ibn al-Khaṭṭāb and Saᶜīd ibn al-Musayyab did not agree with it.

Like the preceding example, this AN comes under the jurisdiction of civil authority. Ibn ᶜAbbās is asked for and gives an opinion, but it is Marwān ibn al-Ḥakam who possesses the authority to put it into law. Similarly, when Mālik refers to ᶜUmar ibn al-Khaṭṭāb and Muᶜāwiyah, he reports the legal judgments [qaḍā'] which they made when in civil authority. Saᶜīd ibn al-Musayyab is reported to have said, ". . . If I were to judge in the matter . . ." Saᶜīd ibn al-Musay-

yab could not judge in the matter, however, because he was never a qāḍī and possessed no powers of jurisdiction.

3. AN: Regarding Divorce and the Pronouncement of Īlā'[1]

> Mālik cites an 'athar which reports that ᶜAlī ibn 'Abī Ṭālib held that one's taking an oath of īlā' from one's wife is not regarded to be a pronouncement of divorce [taṭlīqah], even if four months have passed, until the husband has been brought before the law and required to make his choice either to resume normal relations with his wife or make a pronouncement of divorce. Mālik then states that this is the AN, and he cites another 'athar which reports that ᶜAbd-Allāh ibn ᶜUmar held the same opinion. Mālik then cites other reports which state that Saᶜīd ibn al-Musayyab, 'Abū Bakr ibn ᶜAbd-ar-Raḥmān, and az-Zuhrī did not agree to this precept; they held, on the contrary, that once four months had passed after the pronouncement of īlā' without the resumption of normal marital relations, the husband would be technically regarded as having made one pronouncement of divorce. Mālik reports, furthermore, that Marwān ibn al-Ḥakam used to hand down legal judgments in accordance with the opinion held by Ibn al-Musayyab and az-Zuhrī.[2]

According to Ibn Rushd, disagreements on this precept resulted from the conjectural wording of the pertinent Qur'ānic verses,[3] which, while stipulating the four month period, do not make it clear whether or not the elapsing of that period constitutes a pronouncement of divorce or whether, according to the opinion expressed in Mālik's AN, the one taking the oath of īlā' would be forced at that time to make a decision.[4] Again, Mālik indicates clearly that this precept constituted a difference of opinion among prominent Ma-

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[1]Īlā': A pre-Islamic custom according to which a husband takes an oath that he will no longer have sexual relations with his wife. See az-Zurqānī, 4:75-76.

[2]Muwaṭṭa', 2:556-557. [3]Qur'ān, 2:226-227.

[4]Ibn Rushd, 2:60 (25).

dīnan fuqahā'. This ᶜamal also comes under the jurisdiction of the judiciary, and Mālik indicates that Marwān ibn al-Ḥakam used to hand down legal rulings in accordance with the opinion which Saᶜīd ibn al-Musayyab and az-Zuhrī regarded to be correct. 'Abū Ḥanīfah and the Kūfans are also said to have held to the opinion contrary to Mālik's AN.[1]

As in the preceding example, Madīnan judicial tradition was not uniform in this matter. Marwān ibn al-Ḥakam represents a variation from the AN in that practice. In the preceding example, ᶜUmar ibn al-Khaṭṭāb and ᶜUmar ibn ᶜAbd-al-ᶜAzīz are reported to have represented variations from the judicial practice of the AN.[2]

The source of the ᶜamal is again difficult to determine. It pertains to the interpretation of a Qur'ānic verse. Thus, it is likely that the ᶜamal would be either of the category of ᶜamal naqlī or ᶜamal qadīm, but one does not know what the Companions ᶜAlī or Ibn ᶜUmar based their interpretations on or what was the basis of the contrary interpretations. It does not appear to be the point of Mālik's AN to indicate the source of the ᶜamal, however, but rather to indicate that it is a type of ᶜamal supported by authoritative Madīnans but, nevertheless, not supported by Madīnan ijtimāᶜ.

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[1]Ibn Rushd, 2:60 (25); al-Bājī, 5:33; az-Zurqānī, 4: 75-76.

[2]See above, pp. 738-739.

4. AN: Advancing the Mukātab's[1] Deadline and Reducing the Amount

> Mālik states that it is the AN that a master may make an agreement with his mukātab according to which the mukātab will be required to pay a reduced amount of money in order to attain his freedom but will have to pay it before the the deadline which had originally been agreed upon. Mālik then states that those who have objected ["kariha"] to this precept did so because they regarded it to be analogous ["li'annahū 'anzalahū manzilat . . ."] to agreements between creditors and debtors--which are regarded to be impermissible--according to which the creditor agrees to reduce the amount of the debt, if the debtor will pay it at an earlier deadline. Mālik argues, however, that the two matters are not analogous ["wa laisa hādhā mithl ad-dain"]. For in this case, the master is not receiving gold for gold or silver for silver. He has only made an agreement the purpose of which is to speed up the process of the slave's emancipation, which will give him rights of inheritance, alter the legal status of the slave, to that of a free man, and bring closer to the master the sacred honor [ḥurmah] of emancipation. Mālik states that the real likeness of this matter is that of a master saying to his slave, "Bring me such and such an amount of money, and you will be free," who then changes his mind and says, "Bring me a lesser amount of money,and you will be free." Furthermore, Mālik continues, the money which a mukātab agrees to pay his master is not an established debt [dain thābit]. For if the mukātab should become bankrupt, the master has no right to claim a part of the mukātab's estate along with the other creditors.[2]

It is clear from Mālik's discussion that there were differences of opinion among the fuqahā' regarding the validity of this AN precept. Mālik does not specify who these fuqahā' were, however, who objected to the AN or whether they were Madīnans or non-Madīnans, and I did not find additional information on this point in other sources.[3] It is note-

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[1]Mukātab: A slave who makes a contract of mukātabah. For the definition of mukātabah, see above, p. 623, n. 2.

[2]Muwaṭṭa', 2:794-795.

[3]See al-Bājī, 7:20; az-Zurqānī, 5:47-48; Ibn Rushd, (Istiqāmah), 2:378.

worthy, however, that analogies play a role in both the AN and the contrary position, according to Mālik's presentation of them. Mālik argues that those who have disagreed with the AN have done so on the basis of what he regards to be a faulty analogy between the contract of mukātabah and the obligations of indebtedness. Mālik explains why he regards the analogy to be false, sets forth an analogy of his own, and concludes by arguing that the agreement of mukātabah is not a debt, properly speaking, because some of the rights which accrue to creditors in cases of bankruptcy do not pertain to those who make contracts of mukātabah in times of bankruptcy.

Because of this analogical reasoning in the AN precept and the absence of related texts, it would appear that this AN was the product of ijtihād. But it would not be possible to determine from the information Mālik presents whether this ijtihād and the subsequent Madīnan ᶜamal constituted ᶜamal qadīm or ᶜamal muta'akhkhir.[1]

5. AN: Capital Punishment in Conspiracies to Commit Murder

> Mālik states that it is the AN that many free men may be put to death over the murder of a single man; that many women may be put to death over the murder of a single woman; or that many slaves may be put to death over the murder of a single slave.[2]

According to Ibn Rushd, this precept is a matter of

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[1]See above, pp. 415-419. [2]Muwaṭṭa', 2:872.

ijtihād going back to a decision of ᶜUmar ibn al-Khaṭṭāb, who made the ruling that a party of Yamanīs who partook in the murder of a single man should all be put to death for their part in the murder. ᶜUmar ibn al-Khaṭṭāb is reported to have said, "Had all the people of Ṣanᶜā' conspired in his murder, I would have put them all to death."[1]

Ibn Rushd states that there was widespread agreement among the early fuqahā' regarding this judgment of ᶜUmar. 'Abū Ḥanīfah and the Kūfans, for example, are said to have agreed. Some of the important Madīnan fuqahā', however, are reported to have differed: ᶜAbd-Allāh ibn az-Zubair, az-Zuhrī, and, according to some reports, the Companion Jābir ibn ᶜAbd-Allāh.[2]

The ᶜamal behind this AN, therefore, would appear to be of the category of ᶜamal qadīm, going back to the ijtihād of ᶜUmar ibn al-Khaṭṭāb. The scope of the precept had been enlarged, however, to pertain to women and slaves as well, who were not involved in ᶜUmar's original decision. This would be another example of an AN precept which came under the authority of the Madīnan judiciary and executive authority.

It might also be pointed out that, according to Ibn Rushd, ᶜUmar ibn al-Khaṭṭāb's ijtihād in this question is

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[1]See Muwaṭṭa', 2:871; Ibn Rushd, 2:241 (9).

[2]Ibn Rushd, 2:241 (9).

a reflection of the principle underlying al-maṣāliḥ al-mursalah, on the presumption that the only type of punishment in cases of conspiracy to murder which would be effective in preventing such conspiracies is one that applies the punishment equally to all.[1]

AN's Pertaining to Ritual and Worship

1. AN: Recitation during Prayer When Praying behind an 'Imām

> Mālik cites an 'athar which states that ᶜAbd-Allāh ibn ᶜUmar held that one who is praying behind an 'imām should not recite anything from the Qur'ān and that the recitation of the 'imām is sufficient for him. Ibn ᶜUmar held, however, that one should recite from the Qur'ān when praying by oneself. Mālik states that Ibn ᶜUmar used not to recite anything when praying behind the 'imām. Mālik then states that it is the AN that one recite some part of the Qur'ān to oneself during those parts of the prayer which are silent, while praying behind the 'imām, but that one not recite anything to oneself when praying behind the 'imām in those parts of the prayer which the 'imām prays out loud. Mālik cites a ḥadīth according to which the Prophet instructed the Companions not to recite the Qur'ān when praying behind an 'imām in those parts of the prayer which the 'imām recites out loud.[2]

Here again the AN is used in connection with a precept regarding which there had been significant differences of opinion in Madīnah, for the opinion of Ibn ᶜUmar, which is cited just prior to the AN, is contrary to it. In the chapter just preceding this one, however, Mālik cites āthār which support the AN, indicating that such prominent Madīnans as ᶜUrwah ibn az-Zubair and al-Qāsim ibn Muḥammad held to the precept of the AN. After citing these āthār, Mālik states,

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[1]Ibn Rushd, 2:241 (9). [2]Muwaṭṭa', 1:86.

"This is what I prefer regarding what I have heard [transmitted] in this matter" ["wa dhālika 'aḥabb mā sami^ctu 'ilayya fī dhālika"].[1]

In the context in which Mālik makes this statement of preference, it appears to be directed toward the contrary opinion of Ibn ^cUmar. Such statements of preference occur frequently in the Muwaṭṭa'. In the ^camal chapters, for example, there were two instances in which Mālik uses the above expression in cases of mixed ^camal to indicate which of them he prefers. Since, in those examples, the other variation of ^camal, which he does not prefer, is also included in the ^camal chapter, Mālik's statement of preference is an indication that both varieties were regarded to be valid parts of ^camal, even though he personally prefers one of them over the other.[2] Similarly, it appears that Mālik is indicating by his statement of preference in this example that he does not regard Ibn ^cUmar's position to be invalid but that he prefers the AN to it.[3]

It is possible that Madīnan ^camal was not uniform in this matter. Ibn ^cUmar's position, as indicated by the 'athar which Mālik cites, reflects not only Ibn ^cUmar's personal practice but also what he taught others to do. It is likely, therefore, that some Madīnans continued to follow Ibn ^cUmar's prac-

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[1]Muwaṭṭa', 1:85. [2]See above, pp. 652-654, 673, 676-677.

[3]Cf. al-Bājī, 1:159. He states that Mālik regarded the precept of the AN to be mustaḥabb in comparison with Ibn ^cUmar's position.

tice. For the ᶜamal of whether or not one recites silently to oneself during the silent parts of the prayer or not at all is an ᶜamal that depends upon personal discretion. It does not come under the authority of the judiciary or executive, and even if it had, there would have been no way to enforce it. Rather, the uniform conformity of Madīnan ᶜamal to the AN in this example would have been, I believe, a function of the prestige and social influence among the Madīnans of those of the Madīnan fuqahā' who practiced and taught the AN. (Al-Bājī states that, according to the "Mawwāzīyah", Mālik's prominent student Ibn Wahb did not follow this AN but followed the position of Ibn ᶜUmar instead.[1])

The ḥadīth which Mālik cites after this AN supports both the AN and the contrary position of Ibn ᶜUmar. It indicates only that one is not to recite the Qur'ān in those parts of the prayer which the 'imām recites out loud. It does not pertain, however, to what one ought to do during those parts of the prayer which are silent, which is the point of difference between the AN and Ibn ᶜUmar's position. Mālik probably would have regarded the ᶜamal of the AN to be of the category of ᶜamal naqlī. Nevertheless, it is ᶜamal naqlī regarding which there were significant differences in Madīnah. It would appear, therefore, that the chief indication Mālik is giving by his citation of the term AN has noth-

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[1]Al-Bājī, 1:159. The Kūfan position in this matter was also in conformity with Ibn ᶜUmar's position; see Ibn Rushd, 1:90-91 (20).

ing to do with the source of the ᶜamal but pertains rather to the fact that the ᶜamal in question is not supported by Madīnan ijtimāᶜ.

2. AN: Conjugal Relations with Wives Who Bleed Continuously

> Mālik states that it is the AN that it is permissible for a husband to have conjugal relations with his wife who has continuous bleeding [al-mustaḥāḍah] on those days when it is permissible for her to make ṣalāh. Similarly, a husband may have conjugal relations with his wife who has delivered a child [an-nufasā'] if she continues to bleed after the normal period of bleeding after delivery. For she is analogous [bi-manzilat] to the mustaḥāḍah.[1]

According to az-Zurqānī the majority of the fuqahā' agreed to the validity of this AN precept. The prominent Madīnans Sulaimān ibn Yasār and az-Zuhrī, however, are said to have disagreed, which is also reported to have been the position of ᶜĀ'ishah. 'Ibrāhīm an-Nakhaᶜī, the Baṣran Ibn Sīrīn, and an unspecified group of other fuqahā' are also reported to have disagreed.[2]

Mālik cites ḥadīth and āthār prior to the AN which indicate that the Prophet and various prominent early Madīnan fuqahā' did not regard continuous bleeding [al-istiḥāḍah] to be the same as menstrual bleeding and that the Prophet advised women who had such continuous bleeding to bathe themselves and resume daily prayers once the customary time of their menstrual periods had passed.[3] There is no explicit

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[1]Muwaṭṭa', 1:63.

[2]Az-Zurqānī, 1:185; cf. al-Bājī, 1:127; Ibn Rushd, (Istiqāmah), 1:61

[3]Muwaṭṭa', 1:62-63.

textual support for the AN, however, and Ibn Rushd speaks of it as one of those matters in Islamic law for which no texts have come down.[1]

The ultimate source of this ᶜamal is not indicated. One would expect it to have been as old as the provision that women who have continuous bleeding may make ṣalāh, since the question of conjugal relations between husband and wife is also likely to have been a concern of those persons who brought the question of istiḥāḍah to the Prophet. It is likely, therefore, that this AN is of the category of ᶜamal naqlī and that the absence of explicit supportive texts is another example of the lack of ḥadīth for types of ᶜamal going back to the time of the Prophet. The fuqahā' who upheld the AN are said to have held that it is an implicit consequence of the precept that the mustaḥāḍah may resume prayer; they reason that if she is permitted to resume prayer, which is of great religious consequence, it goes without saying that she can resume normal conjugal relations. Those who disagreed, however, are said to have held that the permission of the mustaḥāḍah to resume making ṣalāh was a special license and had nothing to do with conjugal relations.[2]

Finally, Mālik's use of analogy is noteworthy in this example. The ḥadīth and āthār which he cites pertain exclusively to the mustaḥāḍah, as does the first part of the AN

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[1]Ibn Rushd, (Istiqāmah), 1:61. [2]Ibid.; al-Bājī, 1:127.

precept. He indicates, however, that women who continue to bleed an unusually long period of time after childbed are analogous [bi-manzilat] to the mustaḥāḍah.

3. AN: Regarding Voluntary Prayers

> Mālik cites an 'athar which reports that ᶜAbd-Allāh ibn ᶜUmar used to say that voluntary prayers during the night or day consist of two rakᶜah's [prayer units] and that one does taslīm [says, "as-salāmu ᶜalaikum"] after every two rakᶜah's. Mālik states that this is the AN.[1]

I know of no differences of opinion among the Madīnans regarding this precept. It constituted a point of difference, however, between Mālik and the Kūfans Sufyān ath-Thawrī and 'Abū Ḥanīfah, although 'Abū Yūsuf and ash-Shaibānī are reported to have held the same opinion in the matter as Mālik. 'Abū Ḥanīfah and Sufyān ath-Thawrī held that there is no set manner in which voluntary prayers are to be performed. They felt that one could perform them in the manner that Mālik has described or in series of three, four, or any number of rakᶜah's, making only one taslīm at the end.[2]

According to Ibn Rushd, one of the bases for this contrary Kūfan position was a ḥadīth transmitted from ᶜĀ'ishah, the wife of the Prophet, in which she describes how the Prophet used to pray during the night in their house. She says that he would pray four rakᶜah's, which she says were too

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[1]Muwaṭṭa', 1:119.

[2]See al-Bājī, 1:213-214; az-Zurqānī, 1:363-364; Ibn Rushd, 1:122 (1).

long and too beautiful to be described, that he would follow these with another four, and that he would finish by praying three.[1] Mālik transmits this ḥadīth in the Muwaṭṭa' in the chapter following the chapter containing this AN, and he also transmits other ḥadīth, such as one in which Ibn ᶜAbbās describes how he prayed with the Prophet one night, which report the Prophet having prayed in series of two rakᶜah's.[2]

These ḥadīth are reports of actions, and it would not be possible to determine on the basis of the material contained in them alone whether one of them were normative and another not. By reference to the Madīnan ᶜamal reflected in the AN, however, Mālik appears to be using the non-textual source of ᶜamal, which in this case would be ᶜamal naqlī, to distinguish between reports of normative and non-normative actions. In the terminology of ash-Shāṭibī the ᶜamal reflected by Mālik's normative AN in this example would constitute as-sunnah al-muttabaᶜah.[3]

4. AN: The Number of Takbīrah's[4] in ᶜId Prayers

Mālik cites an 'athar which reports that 'Abū Hurairah would lead both of the annual ᶜīd prayers, making seven takbīrah's in the first rakᶜah before recitation

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[1]Ibn Rushd, 1:122 (1). [2]Muwaṭṭa', 1:120-122.

[3]For ash-Shāṭibī's discussion of the use of ᶜamal to distinguish between normative and non-normative actions and the concept of sunnah muttabaᶜah, see above, pp. 490-497.

[4]Takbīrah: A gesture made in ṣalāh in which one raises one's hands parallel to the shoulders or ears with palms fac-

of the Qur'ān and five takbīrah's in the second rakᶜah before recitation. Mālik states that this is the AN.[1]

Ibn al-Qāsim refers to this precept in the Mudawwanah as an AN, and he says that it was followed by a group of the people of Madīnah ["jamāᶜah min 'ahl al-Madīnah"], which, although he does not indicate who among the Madīnans may have disagreed with it, is an indication that not all agreed.[2] According to Ibn Rushd, the Companions Ibn ᶜAbbās and 'Anas ibn Mālik held that there should be nine takbīrah's in each rakᶜah of ᶜīd prayers. The prominent Madīnan Successor Saᶜīd ibn al-Musayyab is said also to have held that opinion.[3]

According to Ibn Rushd and al-Bājī, no authentic ḥadīth have been transmitted on how many takbīrah's the Prophet made when praying ᶜīd prayers, although there are numerous ḥadīth about the Prophet's having led the people in praying ᶜīd prayers. The chapter in which Mālik cites this AN, for example, contains such ḥadīth reporting which parts of the Qur'ān the Prophet recited while leading both of the annual ᶜīd prayers. Thus, there would have been no question in Mālik's mind about the ᶜamal of ᶜīd prayers going back to the Prophet. Al-Bājī and Ibn Rushd hold that Mālik's AN precept in this example, therefore, is derived from the nontextual source of Madīnan ᶜamal naqlī, which was in conform-

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ing outward and says the words, "Allāhu 'akbar" [God is the greatest of all]. For the definition of ᶜīd prayers, see above, p. 659, n. 2.

[1]Muwaṭṭa', 1:180. [2]Mudawwanah, 1:155 (24).

[3]Ibn Rushd, 1:127 (19).

ity with the 'athar which Mālik transmits from 'Abū Hurairah.[1]

5. AN: Takbīr after Prayer during the Days of Tashrīq[2]

> Mālik states that it is the AN that takbīr is done after each of the obligatory daily prayers during the days of tashrīq, beginning with the takbīr of the 'imām and the people praying with him on the day of sacrifice [the tenth day of the pilgrimage] after the ẓuhr [noon] prayer and ending with the takbīr of the 'imām and the people praying with him after the dawn [ṣubḥ] prayer on the last of the days of tashrīq. Mālik then states that takbīr is required [wājib] of men and women during the days of tashrīq, whether they pray in groups or by themselves, whether they are present at the pilgrimage or elsewhere in the world. Mālik states that "al-'ayyām al-maᶜdūdāt" [the numbered days] referred to in the Qur'ān are a reference to the days of tashrīq.[3]

There is said to have been general agreement among the fuqahā' that the Qur'ānic verse Mālik refers to at the end of this AN--". . . And call [the name of] God to remembrance during the numbered days"[4]--is a reference to the practice of doing takbīr during the days of tashrīq after the performance of the obligatory prayers. But there were extensive differences of opinion among the fuqahā' regarding the details of this ᶜamal, such as those which Mālik has set forth in the AN. Without going into all of the details of these differences, Ibn Rushd states that there were ten different opinions on

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[1]Ibn Rushd, 1:127 (19); al-Bājī, 1:319. Al-Bājī says that there is a ḥadīth on the number of takbīrah's which the Prophet recited in ᶜīd prayers and that it supports Mālik's AN. This ḥadīth, he states, however, is not regarded to be authentic.

[2]Tashrīq: Three days of festivity at the conclusion of the pilgrimage and following ᶜīd al-'aḍḥā.

[3]Muwaṭṭa', 1:404. [4]Qur'ān, 2:203.

this matter, which he attributes to the fact that this matter was transmitted exclusively by ᶜamal without there being any authentic ḥadīth in the matter, which is also corroborated by az-Zurqānī.[1]

The prominent Madīnan az-Zuhrī agreed on the time when the takbīr is supposed to begin as set forth in Mālik's AN, but, according to Ibn Rushd, az-Zuhrī disagreed regarding the time when the takbīr of the days of tashrīq is supposed to end. Whereas Mālik states that it ends with the dawn prayer on the last of the days of tashrīq, az-Zuhrī is said to have held that it did not end until after the ᶜaṣr [afternoon] prayer on that day. Sufyān ath-Thawrī is said to have taken az-Zuhrī's position regarding the time when the takbīr ends, but he believed that the takbīr should begin a day earlier.[2] There were some who held that the takbīr pertained only to men; not to men and women as in Mālik's AN. There were some who held in contrast to Mālik's AN that it pertained to those who were praying in groups and not to those who were praying by themselves. Some held that the takbīr pertained only to those who were participating in the pilgrimage, and so forth.[3]

This AN, therefore, would be of the category of ᶜamal

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[1]Ibn Rushd, (Istiqāmah), 1:213; az-Zurqānī, 3:217; cf. al-Bājī, 3:41-43.

[2]Ibn Rushd, (Istiqāmah), 1:213.

[3]See citations in note 1. No indication is given of who held these opinions, with the exception of Ibn Rushd's specification of az-Zuhrī and Sufyān ath-Thawrī's positions.

naqlī, and it would be another instance of a precept which had been transmitted almost exclusively by the non-textual source of ᶜamal without the supporting verification of explicit legal texts. It is also a matter regarding the details of which there were extensive differences of opinion among the early fuqahā', and, as indicated by az-Zuhrī's somewhat different position in this matter, there was also disagreement on the AN among the prominent Madīnan fuqahā'.

Conclusions

In all but one of the examples of AN analyzed in this chapter there was evidence of significant differences of opinion among the Madīnan fuqahā', which in four of the examples were explicitly set forth in the Muwaṭṭa'.[1] In another of the examples, Mālik indicates that there were differences of opinion regarding the AN, but he does not indicate from whom that difference of opinion came, and I could find no specific information in other sources.[2] Saᶜīd ibn al-Musayyab is reported to have disagreed with four of the AN's in this chapter.[3] Another of the so-called Seven Fuqahā' of Madīnah, Sulaimān ibn Yasār, is reported to have disagreed with one of them.[4] And Mālik's teacher az-Zuhrī is reported as having disagreed with three of the AN precepts analyzed.[5] Similarly,

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[1]See above, pp. 734 - 735, 738 - 739, 741 , 746-747. I could find no evidence for differences of opinion in Madīnah on the third AN pertaining to worship, pp. 751 - 752.

[2]Above, pp. 743 - 744. [3]Above, pp. 734-735, 738-741, 753.

[4]Above, p. 749. [5]Above, pp. 745, 749, 755.

az-Zuhrī and Sa^{c}īd ibn al-Musayyab are reported to have disagreed with one of the AN's discussed prior to this chapter, while Mālik's teacher 'Abū 'z-Zinād ibn Dhakwān is reported to have disagreed with another.[1] Prominent Madīnan Companions are also reported to have disagreed with some of these AN's analyzed in this chapter: ^{c}Umar ibn al-Khaṭṭāb,[2] Ibn ^{c}Umar,[3] ^{c}Ā'ishah,[4] Jābir ibn ^{c}Abd-Allāh,[5] ^{c}Abd-Allāh ibn az-Zubair,[6] and the prominent Successor and one-time governor of Madīnah ^{c}Umar ibn ^{c}Abd-al-^{c}Azīz.[7]

In several of the AN's of this chapter I was unable to determine what the extent of agreement or disagreement upon the precept was outside of Madīnah. 'Abū Ḥanīfah is reported as having disagreed with two of them;[8] Sufyān ath-Thawrī is also reported to have disagreed with two of the AN's of this chapter;[9] and 'Ibrāhīm an-Nakha^{c}ī, Ibn Sīrīn, and an unspecified group of others are reported to have disagreed with another.[10] Ibn ^{c}Abbās is reported to have dis-

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[1]See above, pp. 720, 668-669. In other examples of Madīnan differences of opinion other than those in the AMN's, az-Zuhrī and ^{c}Urwah ibn az-Zubair are reported to have disagreed with Mālik's MdS precept (p. 572). Sa^{c}īd ibn al-Musayyab is said to have disagreed with an ^{c}amal precept described as SN (p. 666). Mālik's teacher Zaid ibn 'Aslam and the Companion ^{c}Umar ibn al-Khaṭṭāb are said to have disagreed with one of the ^{c}amal precepts (p. 678), while Sa^{c}īd ibn al-Musayyab and Ibn ^{c}Umar are said to have disagreed with another ^{c}amal precept (p. 679).

[2]Above, pp. 738-739. [3]Above, p. 746. [4]Above, p. 749.

[5]Above, p. 745. [6]Above, p. 745. [7]Above, pp. 738-739.

[8]Above, pp. 742, 751. [9]Above, pp. 751, 755.

[10]See above, p. 749.

agreed with another,[1] while there is said to have been extensive disagreement among the fuqahā' regarding the last AN of this chapter, although I was able to find few details about it.[2]

The source of the Madīnan ᶜamal in many of these examples would be very difficult to determine, although in some cases Mālik cites ḥadīth related to the AN or refers to Qur'ānic verses, which indicate that he regarded those particular AN's as going back to the era of the Prophet.[3] Most of the AN's I have analyzed in this chapter would appear to be of the category of ᶜamal naqlī; all of the AN's pertaining to matters of ritual and worship, for example, appear to fall in that category.[4] One of the AN's appears to be of the category of ᶜamal qadīm, i.e., going back to the ijtihād of the Companions.[5] Two of the AN's appear to be either ᶜamal naqlī or ᶜamal qadīm,[6] and, although another of the AN's appears to have been the product of ijtihād, it would not be possible to determine from the information Mālik gives whether it originated with the ijtihād of the Madīnan Companions--and, hence,

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[1]See above, p. 753. [2]Above, pp. 754-755.

[3]See, for example, pp. 736-737, 738, 742, 748, 751-752, 753, above.

[4]Above, pp. 736-737, 748, 750, 751-752, 753, 755-756; cf., 740, 742.

[5]Above, p. 745. [6]Above, pp. 740, 742.

was ᶜamal qadīm--or whether it originated with the ijtihād of Madīnan Successors--and, hence, should technically be classified as ᶜamal muta'akhkhir.[1] Since all of the precepts analyzed in this chapter are classified as AN's, despite the apparently wide range of diversity of their sources, one is led to conclude that Mālik is not using the term AN to identify the source of the ᶜamal of these precepts but, rather, to indicate that, although they are part of Madīnan ᶜamal, they are not supported by Madīnan local consensus. Mālik makes this distinction between AN and the term AMN quite explicit, for example, in the first AN precept of this chapter.[2]

It is clear from the AN precepts in this chapter as well as Mālik's reliance upon ᶜamal in other matters in which there had been significant differences of opinion among the Madīnan fuqahā' that Mālik regarded Madīnan ᶜamal to be a valid source of law even in matters upon which there was no Madīnan consensus. Nevertheless, Mālik must have believed that there was some difference between the authoritativeness of those types of ᶜamal like AMN, AMN-X, A-XN, S-XN, and so forth, which were supported by the consensus of the Madīnan fuqahā', and those like AN which were not. Otherwise, there would seem to be little point in drawing a distinction between them in his terminology; he might just as well have referred to them all, for example, as Madīnan ᶜamal.

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[1]See above, p. 744. [2]Above, pp. 734-735.

Finally, there were examples in this chapter as in earlier examples of Mālik's providing detailed information from the non-textual source of ᶜamal naqlī for precepts regarding which no authentic ḥadīth had been transmitted.[1] Furthermore, there were three instances of analogies in these AN's.[2]

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[1]See above, pp. 749-750, 753, 754-755.

[2]Above, pp. 740, 743-744, 750.

APPENDIX 1

'ABŪ ḤANĪFAH'S RESTRICTIONS UPON THE ACCEPTANCE OF ISOLATED ḤADĪTH

APPENDIX 1

'ABŪ ḤANĪFAH'S RESTRICTIONS UPON THE ACCEPTANCE OF ISOLATED ḤADĪTH[1]

1. Isolated ḥadīth must not be contrary to the well-known, established precepts of the Ḥanafī school

2. Isolated ḥadīth must not be contrary to the general [ᶜāmm] or obvious [ẓāhir] meaning of Qur'ānic texts, which 'Abū Ḥanīfah regards as being definitive in terms of their general or obvious indications

3. Isolated ḥadīth must not be contrary to the well-known sunnah of the Prophet, whether that sunnah be based on words or deeds of the Prophet

4. If there are two or more contradictory isolated ḥadīth in a matter, 'Abū Ḥanīfah will give one of them priority over the others by virtue of such considerations as the transmitter of that ḥadīth having been faqīh, while the others were not

5. 'Abū Ḥanīfah will reject an isolated ḥadīth if the transmitter of it is known to have followed a practice contrary to what is embodied in the ḥadīth[2]

6. When two or more isolated ḥadīth agree on a matter,

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[1]The following stipulations are taken primarily from al-Kawtharī, pp. 36-38. Some of the details are taken also from Zakī-ad-Dīn Shaᶜbān, the citations for which are given individually.

[2]Shaᶜbān states that 'Abū Ḥanīfah held that the transmitters of such ḥadīth must have known the rulings embodied in them to have been abrogated or, for some other reason, not to have been obligatory or desirable. And, if this were not the case and the transmitter had simply refused to follow the ḥadīth willfully, 'Abū Ḥanīfah reasoned that the transmitter would not be regarded to be worthy of transmitting ḥadīth. Zakī-ad-Dīn Shaᶜbān, pp. 63-65.

but one or more of them contain additional information which is not contained in the others, 'Abū Ḥanīfah will not accept that additional information, but will follow instead only that upon which all of the ḥadīth agree

7. 'Abū Ḥanīfah rejects isolated ḥadīth which pertain to matters of the nature of ᶜumūm al-balwā [general necessity][1] when the rulings in those ḥadīth are unknown to the Kūfan fuqahā' or through other well-established sources of law

8. 'Abū Ḥanīfah rejects isolated ḥadīth whenever any of the Companions, who held to a practice contrary to that ḥadīth, is known to have rejected it

9. Similarly, 'Abū Ḥanīfah rejects isolated ḥadīth whenever any of the highly regarded Muslims of the early generations [as-salaf] are known to have rejected them

10. When isolated ḥadīth which stipulate the severity of accepted and well-established criminal punishments [ḥudūd] and other punitive measures [ᶜuqūbāt] differ with each other, 'Abū Ḥanīfah follows those ḥadīth the stipulations of which are the least severe[2]

11. Similarly, when isolated ḥadīth which stipulate what the offenses are for which punishments are to be inflicted conflict with each other, 'Abū Ḥanīfah follows those ḥadīth which make the minimum offense greatest[3]

12. When two or more isolated ḥadīth conflict with each other on the same matter, 'Abū Ḥanīfah follows those ḥadīth which are supported by the largest number of āthār

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[1]For discussion of the concept of ᶜumūm al-balwā, see above, pp. 184-188.

[2]It might be noted that 'Abū Ḥanīfah does not regard isolated ḥadīth as being an independent source for establishing criminal punishments and punitive measures, because he regards such matters as being of the nature of ᶜumūm al-balwā.

[3]For example, 'Abū Ḥanīfah--as al-Kawtharī points out--rejects a ḥadīth which states that a thief's hand should be cut off for stealing a quarter of a piece of gold for a ḥadīth which sets the minimum at ten pieces of silver.

13. 'Abū Ḥanīfah will reject isolated ḥadīth whenever they are contrary to the ᶜamal of the Companions and Successors in any of the cities in which they settled

14. 'Abū Ḥanīfah stipulates that the transmitter of the ḥadīth must have retained the ḥadīth in perfect memory from the time he first heard it until the time he transmitted it and that the transmitter must not have had to rely upon writing the ḥadīth down in order to transmit it

APPENDIX 2

SYMBOLS AND SPECIAL INDEXES FOR MĀLIK'S TERMINOLOGY IN THE *MUWAṬṬA'*

TABLE 1

KEY TO SYMBOLS

Symbol	Meaning
-o	sign of negation, as in -x [not x; there is no x]
ō	"on; in accordance with," as in x̄ [in accordance with x. [ᶜalā hādhā]
:	"and," when joining qualifiers.
ọ	"in," as in ẋ, "in x, on this matter."
]	"from; of," as in]Ib,"of the people of knowledge in our city."
o'	"other than," as in x', "a different x, a contrary precept."
;	"but rather," as in -x;x',"not this precept, but rather another precept."
1	"anyone" ['aḥad], as in -st1]Iqlx, "I have never heard any [not one] of the men of knowledge say that."
@	"all" [kull], as in @dqlx, "all those I met [in my early years] said this."
&	"and," but only when used within the qualifying expression and not when joining different qualiers, as in q&ḥ, "of old and late" [qadīman wa ḥadīthan].
?	"is there?"
A	"al-'amr" [the directive].
Ā	"ᶜalā hādha-l-'amr" [in accordance with this directive].
Ạak	"I follow ['ākhudhu bi] this directive."
Ạl	"al-ᶜamal"
Alẋ	"al-ᶜamal fī x" [used for the chapters in the Muwaṭṭa' that are so entitled. Not a term].
AlN	"al-ᶜamal ᶜindanā"
AlNs . . .	"ᶜamal an-nās"
AMN	"al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā"
AMN-XN . .	"al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā al-ladhī la-khtilāf fīhi"
AN	"al-'amr ᶜindanā"
ANx̄	"wa ᶜalā hādhā al-'amr ᶜindanā"
AN-X . . .	"al-'amr ᶜindanā al-ladhī la-khtilāf fīhi"
ANn	"this is the AN that we hold to [na'khudhu bihi]"
ANs	"'amr an-nās"
ANsN . . .	"wa hādhā 'amr an-nās ᶜindanā"
A-X	"al-'amr al-ladhī la-khtilāf fīhi"
A-XN . . .	"al-'amr al-ladhī la-khtilāf fīhi ᶜindanā"

TABLE 1--Continued

b	"bi-baladinā" [in our city"
-bg	"mā balaghnī" or "lam yablughnī" [nothing has reached me; I have not heard]
d	"'adraktu" [I met (during the early years of my life)]
F	"al-fuqahā'"
FN	"fuqahā'unā"
ḥb	"hādhā 'aḥabb mā samiᶜtu 'ilayya," etc. [this is what I regard as preferable of all that I have heard, or I prefer this]
ḥd	"ḥadd" [a limit]
ḥdmᶜrfmqt .	"ḥadd maᶜrūf mawqūt" [a limit well-known and stipulated]
ḥth	"ḥadīth"
I	"'ahl al-ᶜilm" [the people of knowledge]
Ib	"'ahl al-ᶜilm bi-baladinā [the people of knowledge in our city]
Ij	"'ijmāᶜ" [consensus]
Ijt	"ijtihād" [the exercise of one's reason to formulate an independent legal judgment]
IjtIm . . .	"ᶜala-jtihād al-'imām" [this is in accordance with the independent legal judgment of the 'imām]
Im	"al-'imām"
Ims	"al-'a'immah" [the 'imām's]
Inh	"'ahl al-ᶜilm yanhawna ᶜan" [the people of knowledge prohibit (this)]
Jb	"al-jamāᶜah bi-baladinā" [(our) group in our city]
jz	"yajūz, jā'iz, etc" [this is permissible]
lx	"like x"
lxAl . . .	"wa ka-dha-l-ᶜamal" [and the ᶜamal is also like this]
M	"mujtamaᶜ ᶜalaihi" [having consensus upon it]
-Mḥth . . .	"there is no consensus on this ḥadīth"
Māḍ	"al-māḍī" or "mā maḍā" [that which was established in the past]
mal	"maᶜmūl bihi" [having been put into practice]
Mḍ	"maḍat" or "maḍā" [it has been established in the past]
MḍS	"maḍat as-sunnah"
mk	"makrūh" [abhorrent]
Ms	"al-muslimīn" [of the Muslims]
N	"ᶜindanā" [with us; in our city; in our opinion]
Ns	"an-nās" [the people]
q&ḥ	"qadīman wa ḥadīthan" [of old and of late]
ql	"yaqūlūn" or "yaqūl" [they say; he says; they said, etc.]
rḍ	"man 'arḍā" [those with whom I am pleased]
ry	"rā'y" [opinion]

TABLE 1--Continued

S	"as-sunnah"
SMs	"sunnat al-muslimīn"
SN	"as-sunnah ᶜindanā"
SN-X . . .	"as-sunnah ᶜindanā al-lattī la-khtilāf fīhā"
-XN . . .	"as-sunnah al-lattī la-khtilāf fīhā ᶜindanā"
Sth-XN . .	"as-sunnah ath-thābitah al-lattī la-khtilāf fīhā ᶜindanā"
shk	"shakk" [doubt]
-shkx̄ṯIb .	"there is no doubt on this matter in a single of the people of knowledge in our city"
Slṯ	"as-sulṯān" [the civil authority]
st	"samiᶜtu" or "kuntu 'asmaᶜ" [I have heard]
stx	"I heard x"
-T	"no term," i.e. there is no term in the chapter
wj	"wājib" [obligatory]
x	"this; this matter; that which; etc."
-x	"not x," i.e. it is not this
x̄	"on x," i.e. in accordance with this
ẋ	"in x," i.e. in this matter
x'	"other than x," i.e. a contrary precept
x̄dIb . . .	"wa ᶜalā hādhā 'adraktu 'ahl al-ᶜilm bi-baladinā" [I found the people of knowledge in our city doing this (or holding to this) early in my life]
xjz	"hādhā jā'iz," etc. [this is permissible]
x-jz	"this is not permissible"
X	"ikhtilāf" [difference of opinion]
-X	"la-khtilāf" [no difference of opinion]
-z	"mā zāl" or "lam yazal" [it has not eased to be; it still is; it has always been]
-zx̄Ib . . .	"lam yazal ᶜalā hādhā 'ahl al-ᶜilm bi-baladinā"
-zInhx .. .	"lam yazal 'ahl al-ᶜilm yanhawna ᶜan hādhā"

TABLE 2

THE DISTRIBUTION OF TERMS

ACCORDING TO CHAPTERS

Abbr. of Chapter	Page Numbers, Full Title, Length			
1. Ṣ/wqt	(1:3-18),"K. Wuqūt aṣ-Ṣalāh," [15]			
	ĀdNs&Ib			
2. Ṭ	(1:18-67),"K. aṭ-Ṭahārah," [49]			
	AN [4]		Alx̣ [6]	
3. Ṣ	(1:67-100), "K. aṣ-Ṣalāh," [33]			
Sx̣	AN [2]	-bgx̣;xdNsx̄:	-zx̄Ib	Alx̣ [2]
4. Ṣ/sw	(1:100),"K. as-Sahw," [1]			
	-T		Alx̣	
5. Ṣ/jum	(1:101-113), "K. al-Jumu^{c}ah," [12]			
	SN	x̄dIb	Alx̣	

TABLE 2--Continued

6. Ṣ/rmḍ	(1:113-117), "K. aṣ-Ṣalāh fī Ramaḍān," [4]	
	-T	
7. Ṣ/l	(1:117-129), "K. Ṣalāt al-Lail," [12]	
	AN	AlN-x̄
8. Ṣ/jam	(1:129-143), "K. Ṣalāt al-Jamāᶜah," [14]	
	-T	Alx
9. Ṣ/qṣr	(1:143-177), "K. Qaṣr aṣ-Ṣalāh fi-s-Safar," [34]	
	-T	Alx
10. Ṣ/id	(1:177-183), "K. al-ᶜĪdain," [6]	
	S-XN MḍS-XN	Alx
11. Ṣ/xf	(1:183-186), "K. Ṣalāt al-Khawf," [3]	
	-T	

TABLE 2--Continued

12. Ṣ/ks	(1:186-190), "K. Ṣalāt al-Kusūf," [4]	
	-T	Alx
13. Ṣ/sq	(1:190-193), "K. al-Istisqā'," [3]	
	-T	Alx
14. Ṣ/qbl	(1:193-199), "K. al-Qiblah," [6]	
	-T	
15. Ṣ/qur'ān	(1:199-222), "K. al-Qur'ān," [23]	
	AN	Al-x̄ Alx
16. Ṣ/jnz	(1:222-244), "K. al-Janā'iz," [2]	
	-T	
17. Z	(1:244-286), "K. az-Zakāh," [42]	
	S-XN SN-X S-XN: stx]I	AMN: A-XN AMN [2] A-XN	AN [5] Alx AN: x̄drḍ]I

TABLE 2--Continued

	MḍS MḍS: x̄dIb SṄ [2] SN: x̄dIb	A-XN: stI		
18. ṢM	(1:286-312), "K. aṣ-Ṣiyām," [26]			
	AN: x̄dIb			
19. ṢM/kf	(1:312-322), "K. al-I^{c}tikāf," [10]			
	Māḍ]S	AN-X	ANx̄	
20. Ḥ	(1:322-426), "K. al-Ḥajj," [104]			
S	A-XN [2]	x̄dIb ĀdIb [2] -XxN: ?1shkx	AN [4] ANx̄ ANn	Alx [4]
21. J	(2:443-472), "K. al-Jihād," [29]			
S	x̂IjtIm: x-NAm^{c}rfmqt;IjtSlṭ			Al-x̄: -Mhth Alx [2]
22. NDH	(2:472-482), "K. an-Nudhūr wa-l-'Aimān," [10]			
	AN [3]		Alx [2]	

TABLE 2--Continued

23. D	(2:482-488), "K. aḍ-Ḍaḥāyā," [6]		
	-T		
24. D/dhb	(2:488-491 , "K. adh-Dhabā'iḥ," [3]		
	-T		
25. D/ṣd	(2:491-500), "K. aṣ-Ṣaid," [9]		
	AMN		AN
26. D/aq	(2:500-503), "K. al-ᶜAqīqah," [3]		
	AN: -wj;ḥbAlx̄:	NsN	Alx̣
27. FRḌ	(2:503-523), "K. al-Farā'iḍ," [20]		
MḍS AMN: S-X: x̄dIb		AMN [3] AMN-X: x̄dIb [4] AMN: x̄dIb [3] A-X: -shk1Ib: lxAl	x̄dIb
28. NK	(2:523-550), "K. an-Nikāḥ," [27]		
@dqlx		AN [4] stx: ANx̄	stx: ANsNx̄ [2]

TABLE 2--Continued

29. NK/ṭlq	(2:550-601), "K. aṭ-Ṭalāq," [51]		
SN-Xx̄ Mḍ̣S SN: SNx̄-shkx̣-Xx̣ SN		x̄dIb [2]	AN [10] ANx̄ [4] xAxN: stx]I
30. NK/rḍ̣	(2:601-609), "K. ar-Riḍ̣ā^{c}," [8]		
			Al-x̄
31. B	(2:609-687), "K. al-Buyū^{c}," [78]		
AMN-X AMN [13] A-XN Amk-XN -Xx̣N	-zInhx	AN [12] ANx̄ [2] AN: ĀJb -zx̄AN AN:-zĀNsN: xjz -xN;x'	-zĀNsN: xjz -zx̄ANsN ḥbx: -zx̄ANsN -zx]AlNsjz: -zx̄Ib -hḍ̣m^{c}rfx̣N: x̣-Almal
32. B/qrḍ̣	(2:687-703), "K. al-Qirāḍ̣," [16]		
	x-jz;x'&Māḍ̣]SMs x-jz: x-]SMs		AMN
33. B/msq	(2:703-711), "K. al-Musāqāh," [8]		
SN S		AN AN: stx ANx̄	ANs AlNsAx̣N

TABLE 2--Continued

34. B/kr	(2:711-712), "K. Kirā' al-'Arḍ," [2]		
	-T		
35. B/shf	(2:713-719), "K. ash-Shuf^{c}ah," [6]		
	x̄S-XN	AN [2] ANx̄ -ḥdxN -xN	
36. QḌ	(2:719-761), "K. al-'Aqḍīyah," [42]		
MḍS [3] SN [2] S	AMN [4] A-XN AN: A-XN AN: A-XN: ḥbx AN-X [2]	AN [9] ANx̄ [3]	Al-x̄;x̄'MḍANsN Almal
37. QḌ/wṣ	(2:761-772), "K. al-Waṣīyah," [11]		
SthN-X SN	AMN [2] AN-X	AN [3] Ḍak	
38. ITQ	(2:772-787), "K. al-^{c}Itq wa-l-Walā'," [15]		
	S-XNx'	AMN [3]	

TABLE 2--Continued

39. ITQ/ktb	(2:787-810), "K. al-Mukātab," [23]

]SMs-X AMN-X AN [6] stx]I: stx]I: x̄dAlNsN
]SMs AMN [6] AN: -st1]Imsx̄: st]IqlxAjz&x-wj
x-]SMs A-XN

40. ITQ/dbr	(2:810-819), "K. al-Mudabbar," [9]

S

41. ḤD	(2:819-842), "K. al-Ḥudūd," [23]

AMN [3] x̄dIb AN [7]
A-XN ANx̄

42. ḤD/shrb	(2:842-849), "K. al-'Ashribah," [7]

SN -zĀIb

43. ḤD/aql	(2:849-877), "K. al-ᶜUqūl," [28]

AMN [6]
-AMNx̣
AMN-X x̄ryFN AN [14] Al-x̄
A-XN: st]I [4] Alx̣ [2]
AN-X [2]

TABLE 2--Continued

44. ḤD/qsm	(2:877-884), "K. al-Qasāmah," [7]

	A-XN	AN
AMN: st]rḍ: x̄IjImsq&h:	S-XN: -zx̄AlNs	AN: -st1]Iqlx

Note: The remaining seventeen chapters of the Muwaṭṭa' (pp. 884-1004) contain no terms. They are chapters pertaining to matters of belief, character, and manners. One of the chapters, however--"Kitāb al-Salām," (2:959-963)--contains an Alx̄ chapter on how one should give greetings.

TABLE 3

INDEX TO SUNNAH TERMS

Term	Chapter and Page Number
S-XN	Ṣ/id: 177; Z: 246, 252; ITQ: 775.
S-XNx̄	B/shf: 713.
AMN: stx]rḍ: x̄IjIms q&ḥ: S-XN: -zx̄AlNs	ḤD/qsm: 879.
S-XN: stx]I	Z: 276.
MḍS-XN	Ṣ/id: 182.
SN-Xx̄	NK/ṭlq: 586.
SthN-X	QḌ/wṣ: 765.
SN: SNx̄-shkx̣&-Xx̣	NK/ṭlq: 568.
SMs-X	ITQ/ktb: 804.
AMN: S-X: x̄dIb	FRḌ: 520.
MḍS	FRḌ: 507; NK/ṭlq: 569; QḌ: 722, 724, 725.
Mād]S	ṢM/kf: 318.
MḍS: x̄dIb	Z: 280.
MḍSMs	B/qrḍ: 692.
]SMs	ITQ/ktb: 804.
x-jz: x-]SMs . . .	B/qrḍ: 693.
AMN: x'-]SMs . . .	ITQ/ktb: 791.

INDEX TO SUNNAH TERMS--Continued

SN	Ṣ/jum: 111; Z: 273, 276; NK/ṭlq: 583; B/msq: 706; QḌ: 722, 722; QḌ/wṣ: 770; ḤD/shrb: 843.
SN: x̄dIb	Z: 268.

S	Ṣ: 92; Ḥ: 367; J: 463; B/msq: 705; QḌ: 735; ITQ/dbr: 810.

TABLE 4

INDEX OF REFERENCES

TO THE PEOPLE OF KNOWLEDGE

Term	Remainder of Usage Chapter and Page Number
Apparent Allusions to Consensus	
-zx̄Ib . . .	[-zĀIb] Ḥ: 338, 364; NK/ṭlq: 590; ḤD/shrb: 844.
	[-bgx̱;xdNsx̄: -zx̄Ib] Ṣ: 71.
	[-zx]AlNs: xjz: -zx̄Ib] B: 653.
-zInhx	[Amk-XN: -zInhx] B: 673.
x̄dIb . . .	Ṣ/jum: 105; Ḥ: 335; FRḌ: 522; NK/ṭlq: 589; ḤD: 826.
	[AMN: S-XN: x̄dIb] FRḌ: 520.
	[MḍS: x̄dIb] Z: 280;
	[SN: x̄dIb] Z: 268.
	[AMN-X: x̄dIb] FRḌ: 506, 515, 517, 518.
	[AMN: x̄dIb] FRḌ: 503, 511, 514.
	[AN: x̄dIb] ṢM: 309.
x̄dNs&Ib	[ĀdNs&Ib] Ṣ/wqt: 13.
@dqlx . . .	NK: 541.
-shkṯIb	[A-X: -shkṯIb: lxAl] FRḌ: 521.
?1shkx̱	[-Xx̱N: ?1shkx̱] Ḥ: 386.
x̄ryFN . . .	ḤD/aql: 865.

INDEX OF REFERENCES TO THE

PEOPLE OF KNOWLEDGE--Continued

Allusions to Groupings of the People of Knowledge

x̄Jb	[ĀJb: AN] B: 615.
x̄drḍ]I . .	[AN: x̄drḍ]I] Z: 268.
stx]rḍ	[AMN: stx]rḍ: x̄IjImsq&ḥ: S-XN: -zx̄AlNs] ḤD/qsm: 879.
stx]I	[S-XN: stx]I] Z: 276.
	[A-XN: stx]I] Z: 250.
	[AN: stx]I] NK/ṭlq: 568.
	[AN: -st1]Imsx̄': stx]I] ITQ/ktb: 788.
	[stx]I: stx]I: x̄dAlNsN] ITQ/ktb: 788.
stx	[AN: stx] B/msq: 708.
	[stx: ANsNx̄] NK: 534, 565.
ẋ-Am^{c}rfmqt	[xīj̄tIm: ẋ-Am^{c}rfmqt;xīj̄tSlṭ] J: 456.
ẋ-ḥdm^{c}rfN	[ẋ-ḥdm^{c}rfN: ẋ-Almal] B: 671.

TABLE 5

INDEX TO A-XN'S

Term	Chapter and Page Number
A-XN	Z: 253; Ḥ: 396, 400; B: 650; QḌ: 730; ITQ/ktb: 796; HḌ: 834; ḤD/aql: 865, 866, 868, 870; ḤD/qsm: 881.
Amk-XN . . .	B: 673.
A-XN: st]I	Z: 250.
AN: A-XN	QḌ: 750.
AN: A-XN: ḥb	QḌ: 721.
AN-X	ṢM/kf: 313; QḌ: 729, 755; QḌ/wṣ: 761; ḤD/aql: 865, 866.
A-X: -shkx̄1Ib: lxAl . . .	FRḌ: 521.

TABLE 6

INDEX TO AMN'S

Term	Chapter and Page Number
AMN	Z: 247, 272; D/sḍ: 494; FRḌ: 507, 508, 509; B: 611, 613, 613, 614, 614, 622, 631, 646, 652, 656, 659, 668, 682; B/qrḍ: 697; QḌ: 741, 754, 755; QḌ/wṣ: 761, 762; ITQ: 772, 776, 783; ITQ/ktb: 789, 791, 791, 792, 812, 814; ḤD: 840, 841, 841; ḤD/aql: 850, 852, 852, 853, 858, 875.
AMN-X: x̄dIb	FRḌ: 506, 515, 517, 518.
AMN-X: . . .	B: 642; ITQ/ktb: 802; ḤD/aql: 872.
AMN: x̄dIb	FRḌ: 503, 511, 514.
ẋ-AMN . . .	ḤD/aql: 859.
AMN: A-XN	Z: 271.
AMN: S-XN: x̄dIb	FRḌ: 520.
AMN: st]rḍ: x̄IjImsq&ḥ: S-XN -zx̄AlNs	ḤD/qsm: 879.

TABLE 7

INDEX TO AN'S

Term	Chapter and Page Number
AN	Ṭ: 22, 60, 63, 63; Ṣ: 86, 92; Ṣ/l: 119; Ṣ/qur'ān: 207; Z: 254, 255, 255, 266, 269; Ḥ: 336, 355, 360, 404; NDH: 473, 474, 479; D/sḍ: 496; NK: 525, 530, 530, 536; NK/ṭlq: 556, 563, 578, 581, 581, 583, 583, 592, 593, 594; B: 610, 615, 619, 638, 644, 646, 661, 662, 665, 670, 671, 676; B/msq: 705; B/shf: 715, 717; QḌ: 732, 733, 735, 735, 738, 743, 748, 753, 758; QḌ/wṣ: 769, 770, 771; ITQ/ktb: 789, 794, 798, 800, 810, 816; ḤD: 827, 830, 836, 836, 837, 837, 838; ḤD/aql: 857, 858, 858, 859, 860, 862, 863, 864, 864, 865, 869, 870, 871, 872; ḤD/qsm: 881.
AN$\bar{x}$	ṢM/kf: 315; Ḥ: 362; NK/ṭlq: 560, 569, 571, 588; B: 621, 666; B/msq: 710; B/shf: 717; QḌ: 726, 744, 756; ḤD: 830.
-z$\bar{x}$AN . . .	B: 684.
AN: $\bar{x}$dIb	ṢM: 309.
AN: $\bar{x}$drḍ]I	Z: 268.

INDEX TO AN'S--Continued

ĀJb: AN	B: 615.
AN: -st1]Imsx̄': stx]I: xjz: x-wj	IQ/ktb: 788.
AN: -st1]Iqlx'	ḤD/qsm: 883.
AN: stx]I	NK/ṭlq: 568.
AN: stx	B/msq: 708.
stx: ANx̄	NK: 528.
ANn	Ḥ/ 342.
Ạak	QḌ/wṣ: 768.
AN: -zĀNsN: xjz	B: 670.
AN: x-wj: ḥbAlx̄: -zx̄ANsN	D/aq: 502.

TABLE 8

INDEX TO TERMS

WITH ᶜAMAL AND AN-NĀS

Term	Remainder of Usage Chapter and Page Number
Negative ᶜAmal Terms	
Al-x̄	Ṣ/qur'ān: 206; NK/rḍ: 608; ḤD/aql: 851.
	[Al-x̄;x̄'MḍANsN] QḌ: 748.
	[Al-x̄: -Mḥth] J: 449.
AlN-x̄	Ṣ/l: 125.
ẋ-Almal	[ẋ-ḥdmᶜrfN: ẋ-Almal] B: 671.
Positive ᶜAmal Terms	
-zx̄AlNs	[AMN: stx]rḍ: x̄IjImsq&ḥ: S-XN: -zx̄AlNs] ḤD/qsm: 879.
-zx]AlNs	[-zx]AlNs: xjz: -zx̄Ib] B: 653.
x̄dAlNsN	[stx]I: stx]I: x̄dAlNsN] ITQ/ktb: 788.
AlNsAẋN	B/msq: 709.
lxAl	Z: 275.
	[A-X: -shkḷIb: lxAl] FRḌ: 521.
Almal	QḌ: 735.

INDEX TO TERMS WITH

ᶜAMAL AND AN-NĀS--Continued

Terms Using an-Nās

-zx̄ANsN	B: 636.
	[ḥbx:-zx̄ANsN] B: 661.
	[AN: x-wj;ḥbAlx̄: -zx̄ANsN] D/aq: 502
	[AN:-zĀNsN: xjz] B: 670.
x̄'MḍANsN	[Al-x̄;x̄'MḍANsN] QḌ: 748.
x̄dANs&Ib	[ĀdNs&Ib] Ṣ/wqt: 13.
x̄ANsN	[stx: x̄ANsN] NK: 534, 565.
x̄dNs	[-bgx̣;xdNsx̄: -zx̄Ib] Ṣ: 71.
ANs	B/msq: 709.

TABLE 9

INDEX TO ^{c}AMAL CHAPTERS

Chapter

1. "Al-^{c}Amal fī 'l-Wuḍū'" 1:18-21
2. "Al-^{c}Amal fī 'l-Masḥ" 1:38
3. "Al-^{c}Amal fī 'r-Ru^{c}āf" 1:39
4. "Al-^{c}Amal fī Man Ghalaba ^{c}alaihi 'd-Dam min Jarḥ 'aw Ru^{c}āf" 1:39-40
5. "Al-^{c}Amal fī Ghusl al-Janābah" 1:44-47
6. "Al-^{c}Amal fī 't-Tayammum" 1:56
7. "Al-^{c}Amal fī 'l-Qirā'ah" 1:80-81
8. "Al-^{c}Amal fī 'l-Julūs fī 's-Ṣalāh" 1:88-90
9. "Al-^{c}Amal fī 's-Sahw" 1:100
10. "Al-^{c}Amal fī Ghusl al-Jumu^{c}ah" 1:101-103
11. "Al-^{c}Amal fī Ṣalāt al-Jamā^{c}ah" 1:134
12. "Al-^{c}Amal fī Jāmi^{c} aṣ-Ṣalāh" 1:166-170
13. "Al-^{c}Amal fī Ghusl al-^{c}Īdain wa 'n-Nidā' fīhimā wa 'l-'Iqāmah" 1:177
14. "Al-^{c}Amal fī Ṣalāt al-Kusūf" 1:186-188
15. "Al-^{c}Amal fī 'l-Istisqā'" 1:190
16. "Al-^{c}Amal fī 'd-Du^{c}ā'" 1:217-219
17. "Al-^{c}Amal fī Ṣadaqat al-^{c}Āmain 'idhā 'Jtama^{c}ā" 1:266-267
18. "Al-^{c}Amal fī 'l-'Ihlāl" 1:331-334
19. "Al-^{c}Amal fī 'l-Hadī ḥīn Yusāq" 1:379-380
20. "Al-^{c}Amal fī 'l-Hadī 'idhā ^{c}Aṭiba 'aw Ḍalla" . . .1:380-381
21. "Al-^{c}Amal fī 'n-Naḥr" 1:394-395
22. "Al-^{c}Amal fī Man 'U^{c}ṭiya Shai'an fī Sabīl-Illāh" 2:449-450
23. "Al-^{c}Amal fī Ghusl ash-Shahīd" 2:463
24. "Al-^{c}Amal fī 'l-Mashī 'ilā 'l-Ka^{c}bah" 2:475
25. "Al-^{c}Amal fī Kaffārat al-Yamīn" 2:479-480
26. "Al-^{c}Amal fī 'l-^{c}Aqīqah" 2:501-502
27. "Al-^{c}Amal fī 'd-Diyah" 2:850
28. "Al-^{c}Amal fī ^{c}Aql al-'Asnān" 2:862
29. "Al-^{c}Amal fī s-Salām" 2:959

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